No. 05-7053

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| Title: | Keshia Cherie Ashford Dixon, Petitioner<br>v.<br>United States |
| Docketed: | October 19, 2005 |
| Lower Ct: | United States Court of Appeals for the Fifth Circuit |
| Case Nos.: | (04-10250) |
| Decision Date: | June 20, 2005 |
| Rehearing Denied: | July 20, 2005 |

**Questions Presented**

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Oct 17 2005 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 18, 2005) |
| Nov 9 2005 | Order extending time to file response to petition to and including December 19, 2005. |
| Dec 19 2005 | Brief of respondent United States in opposition filed. |
| Dec 29 2005 | DISTRIBUTED for Conference of January 13, 2006. |
| Jan 13 2006 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question one presented by the petition. |
| Jan 21 2006 | Motion to appoint counsel filed by petitioner Keshia Cherie Ashford Dixon. |
| Feb 9 2006 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner. |
| Feb 15 2006 | Motion DISTRIBUTED for Conference of March 3, 2006. |
| Feb 27 2006 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including February 28, 2006. |
| Feb 27 2006 | Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. |
| Feb 28 2006 | Joint appendix filed. |
| Feb 28 2006 | Brief of petitioner Keshia Cherie Ashford Dixon filed. |
| Mar 6 2006 | Motion to appoint counsel filed by petitioner GRANTED. J. Craig Jett, Esquire, of Dallas, Texas is appointed to serve as counsel for the petitioner in this case. |
| Mar 6 2006 | SET FOR ARGUMENT on Tuesday, April 25, 2006. |
| Mar 17 2006 | CIRCULATED. |
| Mar 24 2006 | Record received from U.S.C.A. 5th Circuit. (1 envelope) |
| Apr 4 2006 | Brief of respondent United States filed. |
| Apr 5 2006 | Record received from U.S.D.C. for the Northern District of Texas. (1 box) |

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|---|---|
| Apr 18 2006 | Reply of petitioner Keshia Cherie Ashford Dixon filed. (Distributed) |
| Apr 25 2006 | Argued. For petitioner: J. Craig Jett, Dallas, Tex. (Appointed by this Court.) For respondent: Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. |

05-7053 ORIGINAL

NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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KESHIA CHERIE ASHFORD DIXON
Petitioner

vs.

THE UNITED STATES OF AMERICA
Respondent

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ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# PETITION FOR WRIT OF *CERTIORARI*

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Attorney for Petitioner

05-7053 NO. ORIGINAL

# IN THE
# SUPREME COURT OF THE UNITED STATES

**KESHIA CHERIE ASHFORD DIXON**
**Petitioner**

**vs.**

**THE UNITED STATES OF AMERICA**
**Respondent**

## MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner asks leave to file the attached petition for a writ of *certiorari* without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following courts:

United States District Court for the Northern District of Texas; and

United States Court of Appeals for the Fifth Circuit.

The undersigned counsel for Petitioner was appointed to represent Petitioner in the District Court pursuant to 18 USC § 3006A, and subsequently in the Court of Appeals.

WHEREFORE, Petitioner prays that she be granted leave to proceed *in forma pauperis* in this case.

Respectfully Submitted,

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Phone: 214-871-7676
Fax: 214-979-0001

Attorney for Petitioner
Keshia Cherie Ashford Dixon

05-7053

NO. _____

ORIGINAL

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**KESHIA CHERIE ASHFORD DIXON**
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**vs.**

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# PETITION FOR WRIT OF *CERTIORARI*

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**Attorney for Petitioner**

## QUESTIONS PRESENTED

### QUESTION PRESENTED NO. 1

WHERE A CRIMINAL DEFENDANT RAISES A DURESS DEFENSE, WHETHER THE BURDEN OF PERSUASION SHOULD BE ON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT WAS NOT UNDER DURESS, OR UPON THE DEFENDANT TO PROVE DURESS BY A PREPONDERANCE OF THE EVIDENCE.

### QUESTION PRESENTED NO. 2

WHETHER PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE EXCLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS THAT WAS OFFERED IN SUPPORT OF HER DEFENSE OF DURESS.

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Rehearing and Rehearing *En Banc* denied by *United States vs. Dixon* ___ F.3d ___ (5th Cir. 2005 (Tex.) July 20, 2005) (TABLE NO. 04-10250).

## STATEMENT OF JURISDICTION

The judgment sought to be reviewed is of a panel of the United States Court of Appeals for the Fifth Circuit that was entered on June 20, 2005, in *United States vs. Dixon*, 413 F.3d 520, 67 Fed. R. Evid. Serv. 630 (5th Cir. 2005).

Panel rehearing and rehearing *en banc* were denied on July 20, 2005.

Jurisdiction is conferred on the Supreme Court to review judgments of a court of appeals on a writ of *certiorari* by 28 USC § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**5th Amendment, United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**6th Amendment, United States Constitution**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

**Rule 402, Fed. R. Evid.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Rule 702, Fed. R. Evid.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

**Rule 52(a), Fed. R. Crim. Pro.**

**Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

## STATEMENT OF THE CASE

On March 5, 2003, a federal grand jury in the Dallas Division of the Northern District of Texas returned a nine count indictment against the Petitioner. Count One alleged that the Petitioner acquired seven firearms while she was under indictment, in violation of 18 USC § 922(n). Counts Two through Nine alleged that the Petitioner made false statements relating to the purchase of the seven firearms and the attempted purchase of another firearm in violation of 18 USC § 922(a)(6) and § 924(a)(2). The indictment was filed in a United States District Court for the Northern District of Texas, Dallas Division, the Honorable Jorge Solis presiding. The United States District Court had jurisdiction over the case pursuant to 18 USC § 3231 because the indictment alleged offenses against the law of the United States.

The Petitioner pled not guilty to the indictment and a jury was impaneled on November 17, 2003. The government presented testimony from agents of the Department of Alcohol, Tobacco and Firearms relating to its investigation; expert testimony on handwriting; and factual testimony from several firearms dealers from whom the firearms were acquired. In its case in chief the government proved that on January 4, and January 11, 2003, that the Petitioner, while at two gun shows, in the company of others, made false statements in order to purchase several firearms and purchased those firearms while she was under indictment.

After the government rested, the Petitioner called as a witness her 16 year old daughter, VeQuisha Ashford, and her 14 year old daughter, Joycelyn Dixon. Each girl testified to a pattern of physical and emotional abuse that the Petitioner had endured from her prior husband, Ted Dixon, and from Petitioner's boyfriend, Thomas Earl Wright, Jr. The girls testified to incidents of violence and threats of violence by Wright and his friend Cory Sanders immediately before each of the two

gun shows. Each girl testified that the violence against their mother had taken place over several months and that it appeared to escalate prior to the purchase of the firearms.

The Petitioner then took the witness stand and testified to a more detailed account of emotional and physical abuse that she suffered at the hands of Ted Dixon for several years, and subsequently from Wright and Sanders in the weeks leading up the gun shows. Petitioner testified that just prior to the purchase of the firearms the violence against her escalated to include Wright striking her in the face, pointing guns at her, threatening to kill her, and threats against her daughters. Petitioner testified that she was forced to go to both gun shows with Wright, and Sanders, or other associates of Wright. Petitioner testified that she was accompanied by Wright and/or one of his associates the entire time she was at the gun shows and that she was acting at all times pursuant to his threats and instructions. At each location in the gun shows where firearms were purchased or attempted to be purchased, a gun dealer testified that young black males were present with Petitioner when the firearms were purchased, but denied that Petitioner was a straw purchaser for anyone. Petitioner admitted that she purchased the seven firearms and attempted to purchase another. Petitioner testified that she purchased the firearms because she was afraid that if she did not, Wright would kill her or cause her serious bodily injury and/or would kill or harm her children. Petitioner testified that she did not like firearms, had not been around firearms until she associated with Wright and would not have purchased the firearms but for the threats from Wright.

After Petitioner testified, the defense sought to call as a witness, Dr. Toby Myers, an expert in the field domestic violence. Dr. Myers had evaluated Petitioner and her family, examined Petitioner's relationship with Ted Dixon and Wright; reviewed background information on Ted Dixon, Wright and Sanders; and observed the testimony of Joycelyn Dixon and Petitioner. The

government objected to Dr. Myers' testimony as not being relevant to any issue in the case and in particular, that the testimony was subjective in nature and therefore not admissible on the issue of duress, citing *United States vs. Willis*, 38 F.3d 170 (5th Cir. 1994). Neither Dr. Myers' data, her methodology, nor her expertise were challenged. The trial judge sustained the government's objection, relying on *United States vs. Willis, supra* and did not allow Dr. Myers to testify before the jury. The defense then rested and both parties closed. Dr. Myers' testimony was then presented to the Court, outside the presence of the jury, pursuant to a bill of exceptions.

Dr. Myers testified that domestic violence is a pattern of coercive control by one party, generally a male, over another party, generally a female, where there are tactics of power and control used along with violence and sexual abuse. She testified that the eight factors that make up a power and control relationship are: intimidation, emotional abuse, isolation, minimizing, denying and blaming, using children for advantage, male privilege, and the coercion and threats. Dr. Myers testified that battering causes physical harm to the victim, damages the victim's self-esteem, causes emotional and psychological harm, causes the victim to become isolated, withdrawn or dependent, causes the victim to become subservient to the batterer, causes the victim to change her behavior so as not to anger the abuser, can cause the victim to engage in criminal behavior, can affect perceptions of the victim, the judgment of the victim and the behavior of the victim. Dr. Myers testified that a woman stays in a battering relationship for financial reasons, due to fear and terror, because she does not have a plan about how she is going to succeed without the batterer and often wants the violence to stop but the relationship to continue. Dr. Myers testified that it is common for the victim in a battering relationship to not seek help from the police, authorities or other persons because of the shame, economic considerations and danger. Dr. Myers testified that a common strategy to avoid

being battered is compliance with the wishes of the batterer. She testified that Petitioner was a battered woman, who was the victim of domestic violence by Ted Dixon and Wright. Dr. Myers testified that the relationship that Petitioner had with Ted Dixon was a power and control relationship that continued even after her divorce from Dixon, and that the Petitioner had a power and control relationship with Wright. In each of those relationships Petitioner was the subservient party.

Dr. Myers went on to analyze Petitioner's relationship with Wright and the events of that relationship, particularly leading up to the purchase of the firearms. Dr. Myers testified that the increase in the severity of the violence, the introduction of guns into the relationship and Wright's threats to the Petitioner's children escalated the power and control that Wright exercised over Petitioner and thus adversely affected Petitioner's ability to make a decision about whether to buy the firearms. Dr. Myers testified that Petitioner's fear of Wright, to which she had testified earlier, was well-grounded due to her experiences with him. Dr. Myers testified that it was consistent with a power and control relationship for the batterer to have little or no regard for the well-being of the victim and therefore put the victim at risk by requiring her to do something illegal. Dr. Myers testified that in her opinion Petitioner did not recklessly or negligently place herself in a situation where she would be forced to choose illegal contact, but that her conduct was a reflection of her fear of Wright. Dr. Myers went on to testify that Petitioner did not call the police because she did not think it would do any good; did not talk to her family because she was embarrassed and did not want to involve them; and that she purchased the firearms in order to buy time to stay alive one more day. Dr. Myers testified that when Petitioner bought the firearms, that in her mind, she did not believe that she had any other choice. After hearing the proffer, the trial judge excluded Dr. Myers'

testimony under the authority of *United States vs. Willis, supra*, finding that all of Dr. Myers' testimony was subjective and therefore not admissible in support of a duress defense.

The Petitioner submitted requested written jury instructions to the trial judge. Petitioner requested that the Court instruct the jury that the Petitioner had the burden of producing evidence to support each element of the duress defense and that if the Petitioner did so, then the government must prove beyond a reasonable doubt that the Petitioner was not under duress or coercion when she purchased the firearms. The trial judge rejected Petitioner's requested instructions and instead instructed the jury that the Petitioner had the burden to establish the defense of duress by a preponderance of the evidence. Defense counsel timely objected to the Court's charge to the jury. The jury convicted Petitioner of all nine counts alleged in the indictment. The Court sentenced Petitioner to thirty-four months in custody and three years of supervised released.

Petitioner timely gave notice of appeal to the United States Court of Appeals for the Fifth Circuit. On appeal, Petitioner complained, *inter alia,* of the trial judge's refusal to allow Dr. Myers testimony before the jury and the instruction to the jury placing the burden of proof on Petitioner on the defense of duress. The panel of the Fifth Circuit upheld the trial court's exclusion of the expert testimony pursuant to *United States vs. Willis, supra.* The panel found that the proffered expert testimony was "inherently subjective" and thus not admissible to support a defense of duress, which requires an "objective inquiry". The panel also held that the trial judge correctly instructed the jury on the burden of proof for a duress defense, citing well-established Fifth Circuit precedent. *United States vs. Willis*, 38 F.3d 170, 179 (5th Cir. 1994).

Petitioner timely filed a Petition for Rehearing *En Banc*, arguing that *United States vs. Willis* should be overruled. Petitioner argued that since *Willis* was decided there had been much research

and debate regarding domestic violence and how that issue should be addressed by courts. A result of that research and debate has been that now courts in most jurisdictions will allow expert testimony on the effects of battering in support a defense of duress, a defense of self-defense, to negate *mens rea* and to educate juries about commonly held misconceptions about the victims of battering. Petitioner cited studies and case law that support the admission of expert testimony on the issue of battering and its effects on its victims, including support of a duress defense. Petitioner urged the *en banc* Fifth Circuit to revisit the issue and overrule *United States vs. Willis*. Petitioner also pointed out in her petition for rehearing that there is a split among the circuits as to the allocation of the burden of proof on a duress defense. As the Fifth Circuit subscribes to the minority rule, which requires the defendant to prove the duress defense by a preponderance of the evidence, Petitioner asked the *en banc* Fifth Circuit to reconsider its position and instead adopt the majority rule which places the burden of proof on the government once the defense has sufficiently raised the duress defense. The Petition for Rehearing *En Banc* was denied.

## REASONS FOR GRANTING THE WRIT

### QUESTION PRESENTED NO. 1

WHERE A CRIMINAL DEFENDANT RAISES A DURESS DEFENSE, WHETHER THE BURDEN OF PERSUASION SHOULD BE ON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT WAS NOT UNDER DURESS, OR UPON THE DEFENDANT TO PROVE DURESS BY A PREPONDERANCE OF THE EVIDENCE.

Duress or coercion is a common law defense that has been recognized by this Court and federal circuit courts. *United States vs. Bailey*, 444 U.S. 394, 409-410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980). There is not a federal statute that establishes the defense of duress. Accordingly, federal courts have developed their own definitions and jurisprudence in regard to the defense of duress or coercion. The courts that have recognized the defense of duress all seem to agree that the burden is on the defendant to produce evidence to support the defense before he entitled to a jury instruction on the issue. Courts are generally agreed that the defendant must introduce evidence on all elements of the defense before the jury can be instructed on the defense. For example, see *United States vs. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982); *United States vs. Mitchell*, 725 F.2d 832, 833 (2nd Cir. 1983); *United States vs. Talbott*, 78 F.3d 1183 (7th Cir. 1996); *United States vs. Dodd*, 225 F.3d 340, 349 (3rd Cir. 2000). However, once a defendant has borne the burden of producing evidence in support of his defense, federal circuit courts have split as to who should bear the burden of persuasion.

In *United States vs. Hearst*, 563 F.2d 1331, 1336 (9th Cir. 1977), the Ninth Circuit held that once the defendant produced evidence to support the duress defense, the government was required to show that the defendant was not acting under duress when she committed the offense for which she was on trial. In explaining its holding the Ninth Circuit stated as follows:

> It is assumed that every defendant's actions were free from duress, absent evidence to the contrary. As was said in the English case of *Regina vs. Gill*, (1963) 1 W.L.R. 841, 846 (Crim. App.): "The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that evidence in such a manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." See *United States vs. Johnson*, 516 F.2d 209, 212-13 (8th Cir. 1975). See also Model Penal Code § 2.09, Comment at 8-9 (Tent. Draft No. 10, 1960); id. § 1.13(2), Comment at 110-12 (Tent. Draft No. 4, 1955).

The Eighth Circuit continues to hold that the government must prove beyond a reasonable doubt that the defendant's acts were not coerced, once the defendant introduces sufficient evidence to support the defense. *United States vs. Simpson*, 979 F.2d 1282, 1287 (8th Cir. 1992); *United States vs. Campbell*, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918, 100 S.Ct. 1282, 63 L.Ed.2d 604 (1980). The Sixth Circuit followed the Eighth Circuit in *United States vs. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982). The Seventh Circuit has held that absent a statute placing the burden of proof on accused, "the burden of proof remains on the government to negate beyond a reasonable doubt the affirmative defense properly raised by the defendant." *United States vs. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996). The Second Circuit has agreed with the Eighth and Ninth Circuits that once the defense of duress is sufficiently placed in issue by the accused, "the prosecution must disprove the defense beyond a reasonable doubt." *United States vs. Mitchell*, 725 F.2d 832, 836 (2nd Cir. 1983). The Tenth Circuit has held that "[c]oercion is an affirmative defense which the government must disprove beyond a reasonable doubt only after the issue has been raised." *United States vs. Falcon*, 766 F.2d 1469, 1477 (10th Cir. 1985). The First Circuit has held that once

"a predicate warranting a duress instruction has been laid, the government is saddled with the additional burden of showing beyond a reasonable doubt that a defendant's criminal acts were not the product of duress." *United States vs. Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996). Thus, the majority of circuits that have addressed the issue require the government to disprove the defense of duress or coercion once the defendant has properly raised the issue.

Although Petitioner produced sufficient evidence to warrant a jury charge on her duress defense, the jury was instructed that Petitioner had to prove each element of the duress defense by a preponderance of the evidence. In so instructing the jury, the trial judge relied on *United States vs. Willis*, 38 F.3d 170, 179 (5th Cir. 1994), which holds that for a defendant to prevail on a duress defense, she must prove each element of the defense by a preponderance of the evidence. In support of that holding, the Fifth Circuit cited *United States vs. Gant*, 691 F.2d 1159, 1165 (5th Cir. 1982) and *United States vs. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991), *cert. denied*, 502 U.S. 958, 112 S.Ct. 419, 116 L.Ed.2d 440 (1991). *United States vs. Gant, supra*, does not appear to address the issue of the burden of proof for a duress defense. In *United States vs. Dominguez-Mestas, supra*, the Ninth Circuit decided that its prior decisions placing the burden of persuasion on the government did not really establish binding precedent and decided that to "require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy." *Id.* at 138. The Court held that where the defense of duress does not involve refutation of any of the elements of the offense, then it is proper to place the burden of proof upon the defense by a preponderance of the evidence. *Id.*; *United States vs. Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999). The Eleventh Circuit has cited *United States vs. Dominguez-Mestas, supra*, with approval and placed the burden of proof on the defendant to prove

the elements of a duress defense. *United States vs. Deleveaux*, 205 F.3d 1292, 1300-01 (11th Cir. 2000). The Third Circuit declined to follow the Seventh Circuit's decision in *United States vs. Talbot, supra*, and instead has followed the Eleventh Circuit by placing the burden of persuasion on the defendant for a justification defense with regard to a felon in possession of a firearms charge. *United States vs. Dodd* 225 F.3d 340, 350 (3rd Cir. 2000).

This Court should grant *certiorari* in this case to resolve the conflict between the circuits. As it now stands, similarly situated defendants will receive disparate treatment depending on the circuit in which their cases are tried. As Petitioner was tried in the Fifth Circuit she had to prove her duress defense by a preponderance of the evidence. Had Petitioner resided in and been tried in the First, Second, Sixth, Seventh, Eighth or Tenth Circuits, the government would have had to prove beyond a reasonable doubt that the defendant was not under duress when she purchased the firearms. The difference in the burdens of proof can be outcome determinative. Under the same facts a defendant may be found guilty in the Third, Fifth Ninth and Eleventh Circuits and be found not guilty in the First, Second, Sixth, Seventh, Eight and Tenth Circuits. The Fourth Circuit and the D.C. Circuit appear not to have addressed the issue.

Another reason for granting *certiorari* in this case is to establish consistency in how defenses are treated in federal courts. The position taken by the minority circuits in placing the burden of persuasion on the defendant is inconsistent with how other defenses have been treated in the federal system. Where an entrapment defense has been asserted, this Court has held that the burden of persuasion is upon the prosecution to prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. *Jacobson vs. United States*, 503 U.S. 540, 548-49, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992). "Of course,

it is a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government. See *United States vs. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir.) *cert. denied*, 437 U.S. 907, 98 S.Ct. 3096, 57 L.Ed.2d 1137 (1978); *United States vs. Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977); *United States vs. Johnson*, 542 F.2d 230, 233 n.4 (5th Cir. 1976); *Frank vs. United States*, 42 F.2d 623, 629 (9th Cir. 1930); see also *Davis vs. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499 (1895) (burden of proof on government with respect to defendant's sanity)." *United States vs. Alvarez*, 755 F.2d 830, 842-43 (11th Cir. 1985), *cert. denied*, *Hernandez vs. United States*, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985), and *Portal vs. United States*, 482 U.S. 908, 107 S.Ct. 2489, 96 L.Ed.2d 380 (1987). See also 2A Fed. Jury Prac. & Instr. § 45.19, 5th Edition. A difference in how self-defense and duress claims are treated would be unfair because each defense excuses what would otherwise be unlawful conduct due to a reasonable fear of death or serious bodily injury.

The Petitioner respectfully requests that this Court grant her Petition for Writ of *Certiorari* in order to resolve the split in authority among the federal courts of appeal as to the burden of persuasion for a duress defense and to establish consistency within the federal system as to who bears the burden of persuasion on affirmative defenses.

## QUESTION PRESENTED NO. 2

WHETHER PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE EXCLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS THAT WAS OFFERED IN SUPPORT OF HER DEFENSE OF DURESS.

The trial judge did not allow the Defendant's expert to testify before the jury on the issue of battering and its effects on its victim. The trial judge relied on the leading Fifth Circuit case on the issue, *United States vs. Willis*, 38 F.3d 170 (5th Cir. 1994). The court in *United States vs. Willis* relied on *United States vs. Johnson*, 956 F.2d 894 (9th Cir. 1992), *supplemented on denial of reh'g sub nom. United States vs. Emelio*, 969 F.2d 849 (9th Cir. 1992). The *Willis* court held that expert testimony on the issue of "battered woman's syndrome" was not admissible to support a defense of duress because evidence that a defendant is suffering from battered woman's syndrome is inherently subjective, and is therefore irrelevant to the objective issue of whether the accused was under duress when the offense was committed. *United States vs. Willis, supra* at 176-77.

*United States vs. Willis* also purported to rely on the Second Circuit's decision in *United States vs. Smith*, 987 F.2d 888 (2nd Cir. 1993), *cert. denied*, 510 U.S. 875, 114 S.Ct. 209, 126 L.Ed.2d 165 (1993). The *Willis* court construed *Smith* to hold that because duress requires an objective showing that expert testimony on battered woman's syndrome would be irrelevant to that defense. *United States vs. Willis, supra* at 176. It appears that the *Willis* court misconstrued the holding of *United States vs. Smith*, and that there is actually a conflict between the two decisions. The *Smith* court did agree that although "duress requires an objective showing, we believe Smith's request for a psychiatrist should have been granted." *United States vs. Smith, supra* at 890. The court in *Smith* went on to say that it did not agree with the trial judge's "denial of Smith's request for a psychiatrist on the ground that testimony as to Smith's unusual susceptibility to coercion was

irrelevant and admissible. A psychiatrist might have testified to other issues at trial and sentencing, including that Smith's behavior was not inconsistent with his being under duress. An expert might have explained that Smith's extreme fear caused him to act aggressively and angrily in the bank and to resist arrest. Fear may also have prevented him from using a loaded gun against Hammerstone [his antognist]. Explaining this behavior might have bolstered the credibility of his duress claim, which was relevant to the jury's determination." *United States vs. Smith, supra* at 891. It is apparent that the Second Circuit believed that expert testimony was relevant and could be helpful to a jury in evaluating a claim of duress. Thus, *United States vs. Smith* seems at odds with *United States vs. Willis* and the Fifth Circuit's decision in Petitioner's case.

*United States vs. Willis* also in conflict with the Tenth's Circuit's decision in *Dunn vs. Roberts*, 963 F.2d 308 (10th Cir. 1992). The issue in *Dunn* was whether the defendant had the specific intent to aid and abet a narcotics transaction, which the *Willis* court found to be a different issue than whether the defendant in *Willis* committed a similar crime under duress. The Fifth Circuit focused on the differences in the two cases as opposed to the substantial similarities. The Tenth Circuit stated the following regarding the use of expert testimony where there was evidence of battering of the accused:

> The mystery in this case, as in all battered woman cases, is why petitioner remained with Daniel Remeta despite repeated abuse. An expert could have explained to the jury the nature of battered woman's syndrome and given an opinion whether petitioner suffered from the syndrome. This is an area where expert opinion is particularly useful and oftentimes necessary to interpret for the jury a situation beyond average experience and common understanding. The effect of the expert testimony would be to explain why a defendant suffering from the battered woman's syndrome would not leave her batterer. As the Kansas Supreme Court stated: "Expert testimony on the battered woman's syndrome would help dispel the

> ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her [batterer] much earlier." *State vs. Hodges*, 239 Kan. 63, 716 P.2d 563, 570 (1986), *overruled on other grounds*, *State vs. Stewart*, 243 Kan. 639, 763 P.2d 572, 579 (1988). Such evidence is introduce to help the jury understand why a battered woman is psychologically unable to leave the battering relationship and why she lives in high anxiety of fear of the batterer. See *Hodges*, 716 P.2d at 570. Thus, such evidence would have provided an alternative reason for petitioner's continued presence with Daniel Remeta. We agree with the district court that the evidence should have been "considered by the jury in evaluating whether petitioner had the requisite intent to participate in the crimes of which she was charged." *Dunn vs. Roberts*, 768 F.Supp. 1442, 1448 (D. Kan. 1991).

*Dunn vs. Roberts*, 963 F.2d 308, 313-14, (10th Cir. 1992). The Tenth Circuit held that by refusing Dunn funds for expert assistance, the state trial court effectively prohibited her from presenting relevant information to the jury, albeit on an essential element of the crime, and held that "petitioner was deprived of the fair trial due process demands." *Id.* Again, the issues in *Dunn vs. Roberts*, as in Petitioner's case, are more alike than they are different. In Petitioner's case, Dr. Myers would have testified about why Petitioner remained with her batterers, explained the effects of battering on its victim, given an opinion that Petitioner was the victim of a power and control relationship, would have interpreted for the jury a situation beyond their experience and understanding and would have helped dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. Thus, the decision below in Petitioner's case also conflicts with the Tenth Circuit's decision in *Dunn vs. Roberts*.

In the last twenty years, there has been much research and debate regarding domestic violence and how that issue should be addressed by courts. The result is that now courts in most jurisdictions

will allow expert testimony on the effects of battering in support of a variety of issues, including a defense of duress, a defense of self-defense, to negate *mens rea* and to educate juries about commonly held misconceptions about the victims of battering. The Supreme Court of New Jersey has held that in a duress case expert testimony is admissible for the purpose of assisting the jury to understand why a defendant would not leave her batterer; was relevant and admissible to assist the jury in its assessment of a defendant's recklessness; was relevant and admissible for the purpose of assisting the jury to understand the defendant's state of mind; but was not admissible to assist the jury in evaluating whether a person of reasonable firmness would engage in the same criminal conduct towards a third person that the defendant committed if they were faced with the same threats of harm as the defendant faced. *State vs. B.H.*, 870 A.2d 273, 291-92 (N.J. 2005). In the state of Washington, expert testimony is admitted "to show how severe, on-going abuse can affect the defendant's perceptions and reactions in ways that may not be apparent to the average juror. See *State vs. Riker*, 123 Wash.2d 351, 359, 869 P.2d 43 (1994). Such evidence is introduced to explain not only the defendant's subjective mental state, but also the reasonableness of the defendant's actions. *Id.*" *State vs. Williams*, 937 P.2d 1052, 1058 (Wash. 1997). In the state of Rhode Island, expert testimony has been admitted in a post conviction proceeding to show how battering had affected a defendant and coerced her into making admissions which contributed to her wrongful conviction. The Supreme Court of Rhode Island found that such evidence could have changed the verdict and granted post conviction relief. *McMaugh vs. State*, 612 A.2d 725, 732-34 (R.I. 1992). The decision below in Petitioner's case is in conflict with decisions from each of the foregoing state Supreme Courts.

As the result of the *Violence Against Women Act, Title IV of the Violent Crime Control and*

*Law Enforcement Act of 1994* (Public Law 103-322), the National Institute of Justice carried out an extensive research and evaluation program to develop knowledge about effective responses to violence against women. One result of that research was a report entitled *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, Report Responding to Section 40507 of the Violence Against Women Act,* produced by the United States Department of Justice and the United States Department of Health and Human Services in May, 1996 (hereinafter "the Report").[1] The Report consists of three separate papers that address three key issues specified in the legislation. The first paper concluded that scientific research and clinical knowledge supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence, that such knowledge is relevant at many points in the criminal justice process and that expert testimony can provide information that helps fact-finders interpret behavior of the battered woman. *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials, Overview and Highlights of the Report,* p. iv. The second paper concludes that while much variation exists, expert testimony on battering and its effects has been found admissible in each of the fifty states plus the District of Columbia. *Trend Analysis: Expert Testimony on Battering and its Effect in Criminal Cases.* The third paper found that "expert testimony is most likely to clarify the evidence when it is drawn from the now extensive body of scientific and clinical knowledge and when the relationship between the content of the testimony and the other evidence or issues in the case is made is explicit." *The Validity and Use of Evidence Concerning Battering and its Effects on Criminal Trials, Overview and Highlights of the Report*, p.

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[1]This report can be found at www.ncjrs.org and at the United States Department of Justice website, at www.usdoj.gov (click on Resources, then Publications).

vii. The government's position throughout this case, and the Court of Appeals' decision in Petitioner's case, conflict with the conclusions of the Justice Department's report.

"In state courts, where the law of self-defense is essentially the same as in federal court in terms of requiring a showing of reasonable conduct by the defendant, there is almost unanimous agreement that defendants may present expert testimony regarding battered woman's syndrome as part of their defense. See generally 18 A.L.R. 4th 1153 (1982 & Supp. 1994)." *United States vs. Marenghi*, 893 F.Supp. 85, 95 (D.Maine 1995). For example, see *People vs. Humphrey*, 13 Cal. 4th 1073, 1082, 921 P.2d 1, 6 (Cal. 1996) (Evidence Code § 1107 allows expert testimony on "battered woman's syndrome"); *Bonner vs. State*, 740 So.2d 439 (Ala. Crim. App. 1998); *Bechtel vs. State*, 840 P.2d 1, 10 (Okla. Crim. App. 1992); § 2901.06, Ohio Revised Code Ann.; *State vs. Sallie*, 81 Ohio St.3d 673, 693 N.E.2d (1998), *reconsideration denied*, 82 Ohio St.3d 1444, 695 N.E.2d 266. See also Barnes, "Admissibility of Expert Testimony Concerning Domestic Violence Syndrome to Assist Jury in Evaluating Victim's Testimony or Behavior", 57 ALR 315, and *Burke*, "Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman", North Carolina Law Review, Dec. 2002, p. 225.

"Because duress and self-defense share the same elements of reasonableness, imminence, and the need for self-protection, one would expect the battered woman's syndrome theory to be as relevant to one defense as to the other." *Id.* at 254. The issue should not be whether the expert testimony is being offered in a self-defense case or a duress case, but rather is the expert testimony helpful to the jury to explain the conduct of the accused. Expert testimony on battering and its effects has been commonly employed to explain conduct that appears counter-intuitive and that is misunderstood by those who are not familiar with dynamics of domestic violence. Such testimony

answers common questions such as why did she not leave, why did she not ask for help, why did she not call the police, why did she continue to put up with the battering or why did she obey his commands. These issues arise in any case that involves a victim of domestic violence, whether it is a self-defense case, a duress case, or whether the victim is a witness for the prosecution. *United States vs. Marenghi*, 893 F. Supp. 85, 96 (D. Maine 1995); *People vs. Romero*, 13 Cal.Rptr.2d 332, 338 (Cal. Ct. App. 1992); *rev'd on other grounds*, 8 Cal. 4th 728, 35 Cal.Rptr.2d 270, 883 P.2d 388 (1994).

The prosecution has also made use of expert testimony to explain the conduct or the testimony of a state's witness that is the victim of domestic abuse. Such expert testimony has been admitted in courts throughout the country when offered by the prosecution to explain seemingly inconsistent conduct or testimony of a state's witness. The leading federal case where expert testimony on "battered woman's syndrome" was admitted on behalf of the prosecution is *Arcoren vs. United States*, 929 F.2d 1235 (8th Cir. 1991), *reh'g denied, cert. denied*, 502 U.S. 913, 112 S.Ct. 312, 116 L.Ed.2d 255 (1991). In that case, the court upheld the admission of expert testimony on "battered woman's syndrome" to impeach an abuse victim's recantation at the criminal trial of the abuser. The court determined that some explanation of the victim's changed statements would aid the jury in deciding which statements were credible. In state courts it is common to admit "battered woman's syndrome" evidence to provide an explanation for a victim's inconsistent statements. For example, see *State vs. Borrelli*, 629 A.2d 1105 (Conn. 1993); *State vs. Grecinger*, 569 N.W.2d 189 (Minn. 1997); *People vs. Jasper*, 119 Cal.Rptr.2d 470 (App. 5th Dist. 2002); *People vs. Lafferty*, 9 P.3d 1132 (Colo. Ct. App. 1999); *State vs. Weaver*, 648 N.W.2d 355 (S.D. 2002); *Bonner vs. State*, 740 S.2d 439 (Ala. Crim. App. 1998); *Alvarado vs. State*, 572 S.E.2d 18 (Ga. Ct. App. 2002); *State*

*vs. Grubbs*, 577 S.E.2d 493 (S.C. Ct. App. 2003). If the prosecution can use expert testimony on the effects of battering to bolster the credibility of a witness, then a defendant should be able to use such evidence to bolster the credibility of her claim of duress.

Expert testimony about battering and its effects has been admitted to explain a variety of behaviors. In *Bonner vs. State*, 740 So.2d 439 (Ala. Crim. App. 1998), expert testimony concerning "battered woman's syndrome" was admitted for the purpose of showing coping mechanisms of battered women and why they do not leave abusive homes even when they are subject to repeated physical violence. Expert testimony concerning "battered woman's syndrome" has been admitted to explain why victims of domestic violence may stay in a battering relationship and may not be as forthcoming as the public might expect in divulging such information and that there is often only a brief window shortly after an incident in which victims will tell the truth. *People vs. Williams*, 93 Cal.Rptr.2d 356 (2nd Dist. 2000). Expert testimony on "battered woman's syndrome" has been admitted for the purpose of dispelling many of the commonly held misconceptions about battered women and to prove the defendant honestly believed she needed to defend herself against imminent death or great bodily injury and to show the reasonableness of her belief. *People vs. Jasper*, 119 Cal.Rptr.2d 470 (App. 5th Dist. 2002). Expert testimony on "battered woman's syndrome" has been admitted to explain why and how, in light of a pattern of abuse, the defendant could honestly and reasonably perceive an imminent threat of immediate danger. *State vs. Smullen*, 844 A.2d 429 (Md. 2004). Expert testimony on "battered woman's syndrome" has been admitted to explain the behavior of a battered spouse. *Ryan vs. State*, 988 P.2d 46 (Wyo. 1999). In *State vs. Yusuf*, 800 A.2d 590 (Conn. App. 2002), expert testimony regarding "battered woman's syndrome" was found to be relevant to assist the jury in determining whether the victim's conduct was consistent with the pattern

and profile of a battered woman. It has been held that expert testimony on "battered woman's syndrome" is useful to refute common misconceptions concerning evidence of prior abuse and the reaction of battered women. *State vs. Tierney*, 813 A.2d 560 (N.J. App. 2003). A domestic violence expert's testimony regarding battered person's syndrome was admissible to explain the behavior of the defendant's girlfriend in failing to report abuse for three months. *Alvarado vs. State*, 572 S.E.2d 18 (Ga. Ct. App. 2002). In *Harrington vs. State*, 858 So.2d 278 (Ala. Crim. App. 2002), *cert. den.*, 858 So.2d 305 (Ala. 2003), it was held that a trial court abused its discretion in a murder prosecution by precluding defense experts from expressing their opinions that the defendant was an abused woman, that the victim was a batterer, and that the defendant suffered from battered spouse syndrome. The court held that such testimony would not have been on the ultimate issue as the question the jury had to decide was the defendant's intent when she fired the weapon and the reasonableness of her belief that she needed to defend herself.

Whether the testimony is being offered on behalf of the defense or the prosecution, whether it relates to a defense of self-defense or duress, or whether the charge was murder, assault or sexual assault, whenever one of the parties is alleged to be the victim of battering, expert testimony on the effect of battering on its victims is relevant to explain the conduct of the battered person. Courts seem to be in near unanimous agreement that the phenomenon of battering is so outside the experience of the typical juror that expert testimony is not only helpful, but often necessary to explain the complex and often perplexing conduct of the victim. Almost all of the issues upon which expert testimony was admitted in the above referenced cases were present in Petitioner's case and would have been addressed by Dr. Myers if she had been allowed to testify before the jury. Her testimony was admissible expert opinion as allowed by Rule 702, Fed. R. Evid., and was relevant

under Rule 402, Fed. R. Evid. The exclusion of Dr. Myers' testimony violated Petitioner's Fifth Amendment Due Process and Sixth Amendment rights to present witnesses on her behalf, depriving her of a fair trial and affecting her substantial rights. Rule 52(a), Fed. R. Crim. Pro.

The Court of Appeals' decision in Petitioner's case conflicts with the decisions of other courts of appeals as set forth above, as well as decisions of the highest state courts and many intermediate state appellate courts. The Court of Appeals' decision is also in conflict with prevailing scientific knowledge and theory on battering and its effects on its victims. Petitioner's petition should be granted in order to resolve the conflicts between federal circuit courts, between federal decisions and state court decisions and so that federal court decisions will reflect the most current scientific thought and knowledge. We, as a society, have recognized that domestic violence is a serious problem. Recognition of that problem by the highest court in the land and clear resolution of significant legal issues by this court will be a great interest and benefit to the public.

# A. Opinion of 5th Circuit Court of Appeals in *United States vs. Dixon*

United States Court of Appeals
Fifth Circuit
FILED
June 20, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10250

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KESHIA CHERIE ASHFORD DIXON,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, JOLLY, and PRADO, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case may have added interest because the defendant introduced evidence concerning battered woman's syndrome as part of her duress defense. Otherwise, this appeal is unremarkable. The appellant, Keshia Cherie Ashford Dixon, was convicted of one count of receiving a firearm while under indictment and eight counts of making a false statement to purchase a firearm.[1] In appealing the conviction, she contends that the district court erred in: (1) refusing to permit expert testimony in support of her defense of duress; (2) excluding as hearsay an out-of-court statement made by her former boyfriend to an ATF agent; and (3) instructing the jury

[1] See 18 U.S.C. §§ 922(n) and 922(a)(6).

that she bore the burden of proving her defense of duress by a preponderance of the evidence. We find no reversible error, and thus AFFIRM.

I

Two Dallas gun shows are the situs of the crime. The relevant facts, occurring in January 2003, are largely undisputed. At both of the gun shows, Dixon purchased multiple firearms by providing false information to dealers. In particular, she provided an incorrect address and stated that she was not under indictment for a felony, when in fact she had been indicted for her role in a check cashing scheme. In each instance, the dealer ran Dixon's information through the National Instant Criminal Background Check System, received a "proceed" response, and sold Dixon the gun.

At trial, Dixon attempted to raise a defense of duress, claiming that she had been coerced into purchasing the guns by her boyfriend, Thomas Earl Wright, and an associate, Hookie Sanders. Both Wright and Sanders were convicted felons, so neither could purchase the guns directly. Each of the gun dealers testified that Dixon was accompanied by several men while at the gun shows, but that they did not seem to be controlling her purchases.

Dixon testified that she had been abused by Wright, who allegedly beat her on a regular basis and threatened her children. Her description of the relationship was largely corroborated by the testimony of her two daughters. Dixon further testified that she

was afraid that, if she did not buy the guns for Wright, he would harm or even kill her or her daughters.

In support of her duress defense, Dixon attempted to introduce the testimony of Dr. Toby Myers, a domestic violence expert, regarding the reactions of battered women to their abusers. The court held that Dr. Myers's testimony addressed Dixon's subjective state of mind and was therefore inadmissible to show duress. Dixon also attempted to introduce the testimony of Kelly Oates, an agent with the Bureau of Alcohol, Tobacco and Firearms, concerning an out-of-court statement by Wright that he gave Dixon $115 to purchase a gun for him. The district court excluded Oates's testimony as inadmissible hearsay.

The jury convicted Dixon on all nine counts.

II

On appeal, Dixon contends that the district court erred in three respects: (1) in refusing to admit Dr. Myers's expert testimony; (2) in excluding Wright's out-of-court statement as inadmissible hearsay; and (3) in giving a jury instruction that placed the burden of proving duress by a preponderance upon the defendant.

A

We first consider whether the district court erred in excluding Dr. Myers's testimony concerning the psychological effects of Wright's battery of Dixon. We review a district court's

> 3. that [she] had no reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
>
> 4. that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994); (quoting United States v. Liu, 960 F.2d 449, 453 (5th Cir. 1992)). Whether apprehension is "well-grounded" turns on whether "a person of reasonable firmness in [the defendant's] situation would have been unable to resist" the threat. Id. (quoting AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 2.09(1) (1985)). In short, the duress defense requires an objective inquiry into whether a defendant's conduct, although illegal, represented her only reasonable alternative to serious bodily injury or death.

1

Most of the expert testimony proffered in this case, like that in Willis, dealt with the defendant's subjective vulnerability to coercion. In Willis, we held that expert testimony that a defendant "suffers from the battered woman's syndrome" is "inherently subjective" and therefore inadmissible to support a defense of duress. Id. at 175, 177. In the case at bar, although Myers carefully avoided using the term "battered woman's syndrome", she nonetheless explained that Dixon was "more vulnerable because she had lost her job" and that Dixon "didn't think [calling the

police] would do any good". Dr. Myers concluded that, as a result of Wright's threats and repeated battery, Dixon believed "in her heart and mind [that] she didn't have a choice" as to whether to buy the guns. In short, this testimony clearly focuses on Dr. Myers's opinions as to Dixon's individual state of mind.

To the extent that Dr. Myers's proffered testimony described Dixon's subjective perceptions of danger, it was not relevant to the inquiry at hand -- that is, to whether such perceptions were "well-grounded" or objectively reasonable under the circumstances. As such, it could not have "assist[ed] the trier of fact" in making any determination of material fact. See FED. R. EVID. 702. Thus, we hold that the district court did not err in excluding this portion of Dr. Myers's testimony.[2]

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[2] Furthermore, Dr. Myers's assertion that Dixon's fears were reasonable does not redeem her testimony. Whether a defendant's apprehension of harm is reasonable under the circumstances is ultimately a question for the jury. Although it is certainly possible that expert testimony might shed light on the reasonableness of a given type of conduct by describing typical reactions to unusual circumstances, such was not the case here. Instead, at the prompting of counsel, Dr. Myers offered the wholly conclusory assertions (1) that Dixon's fear of Wright was "well grounded" and (2) that her decision not to leave Wright was not "reckless or negligent".

These statements represent a transparent strategy to distinguish Dr. Myers's testimony from that which was excluded in Willis by inserting brief, perfunctory "objective" characterizations into testimony that otherwise focuses exclusively on the defendant's subjective perceptions. If the rule announced in Willis -- i.e., that expert testimony as to a defendant's subjective beliefs is inadmissible to show duress -- were so easily swept aside, it would be meaningless.

Our analysis does not end here, however. Dixon contends that Dr. Myers's proffer did not focus exclusively on subjective perceptions. Rather, Dixon argues, the proffer included a significant amount of "'objective' testimony that would show that [Dixon's] fear ... was well-grounded in her history and experience with Wright". Although it is not altogether clear to us what Dixon means by "objective testimony", the record suggests that the term refers to testimony by Dr. Myers as to the facts of Dixon's relationship with Wright.[3]

Such testimony, Dixon contends, would be based upon, inter alia, "interviews with Dixon's mother and daughters, statements from Wright and Sanders to the government" and "the testimony of ... Jocelyn Dixon". In short, it would be inadmissible hearsay. See FED R. EVID. 802-804. Dixon points out that the facts upon which an expert opinion are based "need not be admissible in evidence in order for the opinion or inference to be admitted". FED. R. EVID.

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[3] Another type of expert testimony that may be termed "objective" is that which describes the typical patterns, circumstances and effects of battery within an abusive relationship without attempting to draw any conclusions therefrom as to the subjective perceptions of a particular defendant. Since Willis was decided, various courts have recognized a distinction between such generalized testimony and "subjective" expert testimony that effectively diagnoses a particular defendant as suffering from battered woman's syndrome. See, e.g., State v. Grecinger, 569 N.W.2d 189, 196-97 (Minn. 1997); Scugoza v. State, 949 S.W.2d 360, 363 (Tex. App. San Antonio 1997); State v. Stringer, 879 P.2d 1063, 1069 (Mont. 1995).

703; see also United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971)(en banc). The inverse of this statement, however, is not true. Where, as here, an expert's opinion testimony is inadmissible, the hearsay upon which that opinion is based is also inadmissible. Were it otherwise, designation as an "expert" would permit any such witness -- regardless of her qualification or the relevance of her testimony -- to escape the ambit of the hearsay rules.

Thus, in view of the inadmissibility of Dr. Myers's opinion testimony, she is not a competent witness to testify as to facts of Dixon's relationship with Wright based solely on what others told her. We therefore hold that the district court did not abuse its discretion in excluding such testimony.

B

Dixon next argues that the district court erred in excluding, as inadmissible hearsay, potentially inculpatory statements made by Wright to Agent Oates. Shortly after his arrest, Wright told Oates that he and an associate had given Dixon $115 to purchase a .380 semiautomatic pistol for them, and had done so because they were convicted felons and could not buy the guns themselves. Dixon acknowledges that Oates's testimony concerning the statement is hearsay, but contends that it is nonetheless admissible as a statement against interest. See FED. R. EVID. 804(b)(3).

The hearsay exception for statements against interest applies only where (1) the declarant is unavailable; (2) the statement tends to subject the defendant to criminal liability, such that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement is corroborated by circumstances clearly indicating its trustworthiness. See United States v. Sarmiento-Perez, 633 F.2d 1092, 1101 (5th Cir. 1981). The district court assumed that Wright would refuse to testify, given the potentially incriminating nature of his statement. As such, the admissibility of Oates's hearsay testimony turned exclusively on whether Wright's admission was corroborated by circumstances indicating its trustworthiness.

We will uphold a determination as to the trustworthiness of an out-of-court statement "unless it is clearly erroneous". United States v. Vega, 221 F.3d 789, 803-04 (5th Cir. 2000). In this case, the district court based its decision to exclude Oates's testimony, in part, on a major inconsistency between Wright's account of events and Dixon's. Although Wright admitted in his statement to Oates that he gave Dixon money to purchase a gun for him, he also asserted that he went to the gun shows "at Dixon's request" to "show her which ones to purchase because she didn't know anything about guns". This directly contradicts Dixon's account, in which Wright and Sanders physically coerced her into going to the gun show with them.

The discrepancy between the two accounts goes to the very heart of the duress defense -- that is, whether Dixon bought the guns under threat of violence. Thus, while Dixon contended that she acted under duress, she sought to introduce a statement that indicated she acted willingly and voluntarily. Faced with such a fundamental inconsistency, the district court did not err in excluding the statement.

C

Finally, Dixon contends that the district court erred in instructing the jury that she, as the defendant, bore the burden of proving her duress defense by a preponderance of evidence. Our circuit's law is clear on this point: "Since a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." Willis, 38 F.3d at 179. As such, Dixon's contention is meritless.

III

For the foregoing reasons, the conviction is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10250

U.S. COURT OF APPEALS
FILED
JUL 20 2005
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KESHIA CHERIE ASHFORD DIXON

Defendant - Appellant

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Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion 6/20/05, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, JOLLY, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-6a

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
DEC 19 2005
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No. 05-7053

IN THE SUPREME COURT OF THE UNITED STATES

KESHIA CHERIE ASHFORD DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
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## QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury that petitioner had the burden of proving her affirmative defense of duress by a preponderance of the evidence.

2. Whether the district court's exclusion of expert testimony on battered woman's syndrome deprived petitioner of a fair trial.



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IN THE SUPREME COURT OF THE UNITED STATES

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No. 05-7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 413 F.3d 520.

## JURISDICTION

The judgment of the court of appeals was entered on June 20, 2005. A petition for rehearing was denied on July 20, 2005 (Pet. App. B1). The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of acquiring a firearm while under indictment, in violation of 18 U.S.C. 922(n); and eight counts of making a false statement to purchase a firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(2). She was sentenced to nine concurrent terms of thirty-four months of imprisonment, to be followed by three years of supervised release, and ordered to pay a $900 special assessment. The court of appeals affirmed. Pet. App. A1-A10.

1. On January 4 and 11, 2003, petitioner purchased multiple firearms at two separate gun shows in Dallas, Texas, by providing false information to gun dealers. Petitioner provided an incorrect address and stated that she was not under indictment for a felony, when in fact she had been indicted for her role in a check-cashing scheme. In each instance, the dealer sold petitioner a firearm after running her information through the National Instant Criminal Background Check System and receiving a "proceed" response. Pet. App. A2; see Indictment 1-4.

2. On March 5, 2003, a federal grand jury returned an indictment charging petitioner with the nine counts on which she was eventually convicted. See Indictment 1-4.

At trial, petitioner admitted that she knew she was under federal indictment when she purchased the firearms and that she had

committed an offense each time she had provided false information. Petitioner raised the defense of duress, alleging that her boyfriend, Thomas Earl Wright, and one of his associates had coerced her into purchasing the firearms for them. Petitioner testified that Wright beat her on a regular basis, threatened her children, and controlled her movements by taking her car keys or accompanying her wherever she went. Petitioner's description of the relationship was largely corroborated by the testimony of her two daughters. Petitioner also testified that she was afraid that, if she did not buy the firearms for Wright, he would harm or kill her or her daughters. Pet. App. A2-A3; Gov't C.A. Br. 5-6.

Each of the gun dealers testified that petitioner had been accompanied by several men at the gun shows, but that they did not appear to be controlling her purchases. On cross-examination, petitioner admitted that she was not in any immediate danger of physical harm while at the gun shows. She also admitted that she had opportunities to extricate herself and her daughters from the abusive situation but had failed to act. Petitioner and her daughters admitted that they had never reported the alleged abuse or threats to relatives, school officials, court personnel, or law enforcement officers, even though they had opportunities to do so. Pet. App. A2; Gov't C.A. Br. 7-8.

In support of her duress defense, petitioner sought to introduce expert testimony from Dr. Toby Myers about the reactions

of battered women to their abusers. The district court held that Myers's testimony was inadmissible to show duress because it addressed petitioner's subjective intentions. Petitioner was allowed to proffer Dr. Myers's testimony outside the presence of the jury. Pet. App. A3; Gov't C.A. Br. 8.

Petitioner requested the district court to instruct the jury that she had the burden of producing evidence to support each element of the duress defense and that, if she did so, the government had to prove beyond a reasonable doubt that petitioner was not under duress when she purchased the firearms. The court denied petitioner's request and instructed the jury that petitioner had the burden of establishing the defense of duress by a preponderance of the evidence. Pet. 8.

3. On appeal, petitioner argued that the district court erred, inter alia, in excluding Dr. Myers's expert testimony and in giving a jury instruction that placed the burden on petitioner of proving duress by a preponderance of the evidence. Pet. App. A3.

a. The court of appeals held that the district court did not abuse its discretion in excluding Dr. Myers's testimony because the testimony was inadmissible under Federal Rule of Evidence 702. Pet. App. A3-A8. The court stated that a duress defense "requires an objective inquiry into whether [petitioner's] conduct, although illegal, represented her only reasonable alternative to serious bodily injury or death." Id. at A5. The court of appeals observed

that, in United States v. Willis, 38 F.3d 175 (5th Cir. 1994), cert. denied, 513 U.S. 1141 (1995), it had held that expert testimony that a defendant "suffers from the battered woman's syndrome" is inadmissible to support a defense of duress because the testimony is "inherently subjective." Pet. App. A5 (quoting Willis, 38 F.3d at 175, 177). In petitioner's case, the court held that most of Dr. Myers's proffered testimony was likewise subjective because it described petitioner's perceptions of danger. Under Federal Rule of Evidence 702, such testimony would therefore not have assisted the jury in making a determination of material fact -- i.e., whether petitioner's fear was "well-grounded" or "objectively reasonable under the circumstances." Pet. App. A6. The court further reasoned that the proffered testimony was not rendered admissible by Dr. Myers's assertions that petitioner's fears were reasonable; the court observed that these conclusory statements were a "transparent strategy" to insert "'objective' characterizations" into testimony that otherwise focused on petitioner's subjective perceptions. Id. at A6 n.2.

In addition, the court of appeals concluded that, to the extent Dr. Myers proffered objective testimony about the facts of petitioner's relationship with Wright, that testimony was inadmissible hearsay. Pet. App. A7-A8. The court noted that, although facts on which an expert opinion is based need not be admissible for the expert's opinion to be admissible, "[t]he

adverse if this statement * * * is not true." Ibid. The court explained that when an expert's opinion is inadmissible, so too is the hearsay on which it is based. Id. at A9. As the court observed, "[w]ere it otherwise, designation as an 'expert' would permit any such witness -- regardless of her qualification or the relevance of her testimony -- to escape the ambit of the hearsay rules." Ibid. Thus, given the inadmissibility of Dr. Myers's opinion testimony, she was not competent to testify "as to facts of [petitioner's] relationship with Wright based solely on what others told her." Ibid.

b. The court rejected petitioner's claim that it was error to instruct the jury that she bore the burden of proving her duress defense by a preponderance of the evidence. Pet. App. A10. Relying on circuit precedent (Willis, 38 F.3d at 179), the court held that a defendant has the burden of establishing affirmative defenses such as duress. Ibid.

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the district court erred in instructing the jury that she had the burden of proving her duress defense by a preponderance of the evidence, and that the decision of the court of appeals conflicts with decisions of other courts of appeals. Petitioner's contentions do not warrant review. The court of appeals correctly recognized that a defendant has the burden of proving the affirmative defense of duress. In any event,

reliance on the facts presented petitioner was not even entitled to a duress defense instruction, this case does not present a suitable vehicle for resolving any disagreement among the courts of appeals on that issue.[1]

a. The decision below is correct. Duress is a common law defense that federal criminal law has incorporated. See United States v. Bailey, 444 U.S. 394, 409-410 (1980). The Due Process Clause does not require the government to bear the burden of disproving an affirmative defense. See Patterson v. New York, 432 U.S. 197, 210 (1977). Nor is the Due Process Clause violated simply because evidence introduced to support an affirmative defense, on which the defendant bears the burden of proof, may "tend to negate" an element of the crime. Martin v. Ohio, 480 U.S. 228, 233-234 (1987). In Martin, this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense, so long as the State permits the jury to consider the self-defense evidence in determining the existence of the elements of the offense. Ibid. Similarly, requiring a defendant to establish duress does not "offend[] [any] principle of justice so rooted in the traditions and conscience of

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[1] This Court previously has denied certiorari on this issue. See, e.g., Dodd v. United States, 532 U.S. 959 (2001) (No. 00-7186); Deleveaux v. United States, 530 U.S. 1264 (2000) (No. 99-8942); Warrick v. United States, 526 U.S. 1070 (1999) (No. 98-9259); Bennett v. United States, 525 U.S. 1042 (1998) (No. 98-8297).

[illegible] as to be ranked as fundamental." Patterson, 432 U.S. at 202 (internal quotation marks omitted).[2] Indeed, placing the burden on the defendant reflects the defendant's superior ability, in the usual case, to adduce the facts supporting an affirmative defense. See United States v. Deleveaux, 205 F.3d 1292, 1300-1301 (11th Cir.), cert. denied, 530 U.S. 1264 (2000).

b. Petitioner argues (Pet. 11-14) that this Court should grant review because, contrary to the Fifth Circuit in this case, other courts of appeals have ruled that where evidence supports a duress defense, the government is required to disprove it. There is some disagreement among the courts of appeals as to which party should bear the burden of persuasion on duress. Like the Fifth Circuit, the Ninth and Eleventh Circuits have held that the defendant bears the burden of proving all of the elements of duress by a preponderance of the evidence. See, e.g., United States v. Fei Lun, 139 F.3d 1303, 1307-1308 (9th Cir.), cert. denied, 525 U.S. 904 (1998); United States v. Dominguez-Mestas, 929 F.2d 1379, 1384 (9th Cir.) (per curiam), cert. denied, 502 U.S. 958 (1991);

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[2] In Patterson, 432 U.S. at 210, and Martin, 480 U.S. at 233, the applicable state criminal code specifically provided that the defendant bore the burden of proving certain affirmative defenses. In upholding that burden allocation, however, this Court did not state that only a legislature has the authority to allocate the burden in that fashion. As the Third and Eleventh Circuits have concluded, when an affirmative defense is read into a statute, "it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed." United States v. Dodd, 225 F.3d 340, 345 (3d Cir. 2000), cert. denied, 532 U.S. 919 (2001); see Deleveaux, 205 F.3d at 1300.

Dominguez-Mestas, 929 F.2d at 1382-1383.[1] The Second, Sixth, Seventh, Eighth, and Tenth Circuits have indicated that, once the defendant puts forward evidence sufficient to present the duress defense to the jury, the burden shifts to the prosecution to disprove beyond a reasonable doubt at least one of the elements of the defense. See United States v. Mitchell, 725 F.2d 832, 833, 836 (2d Cir. 1983); United States v. Riffe, 28 F.3d 565, 568 n.2 (6th Cir. 1994); United States v. Talbott, 78 F.3d 1183, 1185-1187 (7th Cir. 1996) (per curiam); United States v. Simpson, 979 F.2d 1282, 1287 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993); United States v. Scott, 901 F.2d 871, 873 (10th Cir. 1990). The First and Third Circuits appear to take an intermediate view, under which the burden depends on whether the offense requires the government to prove specific criminal intent. See United States v. Amparo, 961 F.2d 288, 291 (1st Cir.), cert. denied, 506 U.S. 878 (1992); United States v. Santos, 932 F.2d 244, 249 (3d Cir.), cert. denied, 502 U.S. 985 (1991); see also United States v. Diaz, 285 F.3d 92, 96-97 (1st Cir. 2002) (discussing limited reach of Amparo); United States v. Dodd, 225 F.3d 340, 345-346 (3d Cir. 2000) (discussing limited reach of Santos), cert. denied, 532 U.S. 959 (2001).

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[1] Although petitioner quotes (Pet. 10-11) the Ninth Circuit's decision in United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 1000 (1978), as supporting her approach, the Ninth Circuit in Dominguez-Mestas held that Hearst's statement regarding the burden of proof of duress was dictum. Dominguez-Mestas, 929 F.2d at 1383.

This case, however, is not an appropriate vehicle for resolving the conflict among the circuits in the burden of proof issue because petitioner was not even entitled to a jury instruction on her putative defense. Although "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," Mathews v. United States, 485 U.S. 58, 63 (1988), the affirmative defense of duress should be submitted to a jury only if evidence of each element of the defense is adduced at trial, see Bailey, 444 U.S. at 415. As petitioner acknowledges, that is the law even in the courts of appeals that apply the approach that she advocates with respect to the burden of proof. Pet. 10 ("Courts are generally agreed that the defendant must introduce evidence on all elements of the defense before the jury can be instructed on the defense.").

At common law, "[d]uress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." Bailey, 444 U.S. at 409. In this case, petitioner does not contest the court of appeals' statement of the elements of a duress defense: (1) a present and imminent threat of "such a nature as to induce a well-grounded apprehension of death or serious bodily injury"; (2) no negligent or reckless conduct by petitioner that placed her

in a situation in which it was probable that she would be forced to choose the criminal conduct; (3) no reasonable, legal alternative to violating the law; and (4) a direct causal relationship between the criminal action and avoidance of the threatened harm. Pet. App. A4-A5 (quoting Willis, 38 F.3d at 175). Thus, petitioner could not have prevailed on her claim of duress, nor should the defense even have been submitted to the jury, if the evidence showed that she had "a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm.'" Bailey, 444 U.S. at 410 (citation omitted).

Petitioner failed to show that she had no reasonable, legal alternative to violating the law. On cross-examination, petitioner admitted that she was not in any immediate danger of physical harm at the gun shows; had opportunities to extricate herself and her daughters from the abusive situation, but had failed to act; and had never reported the alleged abuse or threats to relatives, school officials, court personnel, or law enforcement officers, despite having opportunities to do so. Gov't C.A. Br. 7-8. Given these opportunities to escape from the coercive influence of Wright, petitioner had a reasonable alternative to acquiring firearms and making false statements at the two gun shows. See Bailey, 444 U.S. at 410. Because petitioner did not avail herself of that alternative, she was not entitled to the duress instruction

she could receive, left with the government to disprove duress beyond a reasonable doubt. See, e.g., United States v. Johnson, 416 F.3d 464, 466-469 (6th Cir. 2005) (defendant not entitled to duress instruction where he failed to warn bank security guard of impending robbery, although he had the opportunity to do so); United States v. Glass, 128 F.3d 1398, 1409 (10th Cir. 1997) (defendant not entitled to duress instruction where she failed to avail herself of reasonable opportunity to seek assistance of law enforcement authorities); United States v. Sotelo, 94 F.3d 1037, 1040 (7th Cir. 1996) (inmate defendant not entitled to duress instruction where he had reasonable opportunity to seek assistance of prison authorities); United States v. Miller, 59 F.3d 417, 422 (3d Cir. 1995) (duress instruction properly refused where defendant talked to authorities, but did not disclose threats underlying claim of duress).

2. Petitioner also contends (Pet. 15-24) that she was deprived of a fair trial by the district court's exclusion of Dr. Myers's testimony. She claims that the court of appeals' decision conflicts with the decisions of other circuits, as well as with decisions of state courts recognizing the admissibility of expert testimony on battered woman's syndrome. Further review of these contentions is unwarranted.

a. Although a defendant has the constitutional right to present a defense to the jury, the right does not include an

"unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Thus, testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." Crane v. Kentucky, 476 U.S. 683, 690 (1986). In this case, the district court allowed petitioner to present the facts underlying her duress defense, but excluded Dr. Myers's proffered testimony under Federal Rule of Evidence 702, which authorizes the admission of qualified expert testimony only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The introduction of expert testimony is a matter committed to the discretion of the district court, and the district court's ruling will not be reversed unless it is "manifestly erroneous." General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997); see generally Daubert v. Merrell Dow Pharmaceuticals Co., 509 U.S. 579, 591-593 (1993).

The district court did not abuse its discretion in excluding the proffered expert testimony. As the court of appeals explained, most of that testimony concerned petitioner's "subjective vulnerability to coercion" and her "subjective perceptions of danger." Pet. App. A5-A6. As such, it was irrelevant to whether petitioner's perceptions were "well-grounded" or "objectively

inadmissible" for purposes of proving her asserted duress defense. Id.; cf. Johnson, 416 F.3d at 469 (rejecting argument that defendant's duress defense should be judged by a "reasonable retarded person standard" because that would "collapse into a subjective, individualized inquiry in each case").

Contrary to petitioner's suggestion (Pet. 15), the court of appeals did not simply rest on its holding in Willis, 38 F.3d at 176-177, that evidence of battered woman's syndrome is inherently subjective. The court went on to consider whether any portion of the proffered expert testimony was objective, and noted that one type of objective expert testimony recognized by courts since Willis "is that which describes the typical patterns, circumstances and effects of battery within an abusive relationship without attempting to draw any conclusions therefrom as to the subjective perceptions of a particular defendant." Pet. App. A7 & n.3. But the court concluded that the only objective testimony proffered by Dr. Myers was inadmissible hearsay. Id. at A7-A8. The court's measured, fact-bound determination does not warrant review.

b. Petitioner erroneously contends (Pet. 15-17) that the court of appeals' decision conflicts with the Second Circuit's decision in United States v. Smith, 987 F.2d 888, cert. denied, 510 U.S. 875 (1993), and the Tenth Circuit's decision in Dunn v. Roberts, 963 F.2d 308 (1992). In Smith, the Second Circuit held that the defendant's request for the appointment of a psychiatrist

to assist with the development of a duress claim should have been granted because a psychiatrist could have testified to issues other than defendant's "unusual susceptibility" to coercion, and could have testified at sentencing. 987 F.2d at 890-891. In so holding, the court emphasized that the duress defense requires an "objective showing" of a "well-founded fear" such that a person of "reasonable firmness in his situation would have been unable to resist." Ibid. That is entirely consistent with the holding below that expert testimony on petitioner's subjective perceptions of danger was not relevant to her duress defense.

Petitioner's reliance on Dunn is equally misplaced. There, the state trial court had refused the defendant's request for funds to employ a psychiatrist to investigate whether she suffered from battered woman's syndrome. 963 F.2d at 309-311. The Tenth Circuit held that refusal of the request was a denial of due process because evidence of battered woman's syndrome was relevant to whether the defendant had the specific intent necessary to commit the crime of aiding and abetting. Id. at 313-314. As petitioner acknowledges (Pet. 17), the Tenth Circuit's holding was based only on the mens rea element of the charged crime. The Dunn court expressly did not address whether evidence of battered woman's syndrome would have been relevant to an affirmative defense of duress. Id. at 312 n.2. In this case, petitioner challenged the exclusion of expert testimony only as it related to her duress

defense, Pet. 11; Pet. C.A. Br. 11; thus, the decision below does not conflict with Dunn.[4]

c. Petitioner also asserts (Pet. 18) that the court of appeals' decision conflicts with the decisions of three state supreme courts. Those decisions, however, relied exclusively on state law; they did not apply federal law on duress or decide the admissibility of expert testimony under Federal Rule of Evidence 702. See State v. B.H., 870 A.2d 273, 285-289, 291 (N.J. 2005); State v. Williams, 937 P.2d 1052, 1058 (Wash. 1997); State v. Riker, 869 P.2d 43, 47-48 & n.1 (Wash. 1994); McMaugh v. State, 612 A.2d 725, 733 (R.I. 1992). Therefore, even to the extent those cases may be inconsistent with the decision below, they do not warrant review of that decision.[5]

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[4] Nor is there any conflict (Pet. 21-22) with the Eighth Circuit's decision in Arcoren v. United States, 929 F.2d 1235 (8th Cir.), cert. denied, 502 U.S. 913 (1991). There, the government was allowed to present expert testimony of battered woman's syndrome in order to explain why, at trial, the defendant's wife had recanted her prior grand jury testimony that defendant had beaten and raped her, and raped another woman. Id. at 1238-1241. The witness's subjective motivation to change her testimony assisted the jury in determining which version of her testimony to believe. Id. at 1241.

[5] Petitioner goes on to discuss (Pet. 20-24) additional state court cases involving the admissibility of evidence of battered woman's syndrome on issues other than duress. Those cases are similarly irrelevant to the district court's exclusion of expert testimony in this case.

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## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

FILED
FEB 27 2006
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No. 05-7053

IN THE

# Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) has more than 12,500 members nationwide, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. With 90 state, local and international affiliate organizations, NACDL speaks for a total membership of some 35,000 in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately 35 *amicus* briefs a year in state and federal appeals courts, including this Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients.

The National Clearinghouse for the Defense of Battered Women (NCDBW), founded in 1987, works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. As a longstanding matter of principle, the National Clearinghouse does not advocate any special legal rules for battered women defendants. The organization is committed to ensuring that battered women charged with crimes, like all defendants, receive

1. No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL or the NCDBW has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this amicus brief; their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

the full benefit of all rights and protections designed to ensure fair trials, accurate verdicts, and appropriate sentences. To this end, the National Clearinghouse seeks to educate those involved in the criminal justice system about battering and its effects, so that legal decisions affecting battered women defendants are not based on misconceptions. The National Clearinghouse also advocates reforms in existing legal rules and practices, where needed to ensure fairness for all accused persons, but never in such a way that the change would afford battered women different or special rights.

The first and only organization to focus exclusively on battered women defendants, the National Clearinghouse works on a wide variety of cases, including those involving self-defense/defense of others, coercion and duress, crimes of omission (such as allegedly failing to protect one's children from a batterer's violence), and cases where the history and impact of abuse help to explain a defendant's behavior and/or rebut the *mens rea* element of the crime. In recognition of its quality services and national leadership role, the National Clearinghouse was chosen in 1993 to be one of five organizations to receive funds from the U.S. Department of Health and Human Services (HHS) as part of the newly formed Domestic Violence Resource Network. Through a number of continuation grants from HHS, the National Clearinghouse remains an active member of the Domestic Violence Resource Network and an integral part of the national leadership of the battered women's advocacy movement.

The position of the National Clearinghouse is that once a defendant has properly raised the issue of duress, it is the government's burden to disprove that defense, and thus to establish the voluntariness of otherwise criminal acts, beyond a reasonable doubt. Nineteen years of research and counseling experience, involving more than 275 cases where duress issues were raised (about 11% of the cases on which the Clearinghouse

has consulted and for which the records are clear in this respect), have led the National Clearinghouse to the firm belief that unless the government bears that burden, many wrongful convictions will surely result, as the risk of jury error due to misunderstanding of the circumstances is especially high in such cases.

## SUMMARY OF ARGUMENT

For well over a century, the federal courts and federal standard jury instructions have placed the burden of persuasion on the government when defenses such as insanity, self-defense, and duress – which bears a strong relationship to both insanity and self-defense – are raised by defendants who satisfy an initial burden of production. There is good reason for doing so. All such defenses wholly negate the foundations of criminal liability, and there is no reason to treat duress differently.

Of late, however, some federal courts have undertaken to parse the elements of particular charged offenses to determine whether duress would "negate" a specific intent element. These courts have created two different duress defenses: one that speaks directly to a particular *mens rea*, and the other that merely "excuses" criminal conduct. Under this theory, the government bears the burden if duress happens to negate the particular *mens rea*, but the defendant bears the burden if it does not, *i.e.*, if duress is only an "excuse." This novel analytical approach cuts the duress defense loose from its historical moorings in this Court's jurisprudence and should be rejected.

The minority approach, followed by the court below, is also impractical and potentially confusing for jurors. A defendant, such as petitioner Dixon, who is charged with multiple offenses and asserts duress as her defense, may well be faced with two sets of jury instructions on the burden with respect to the defense – one that places the ultimate burden on her for one count, and a conflicting instruction that places the burden on the

government for another count. Or two defendants who are subjected to exactly the same coercion will have their duress defense subjected to different burdens of proof, depending on whether the crime that they are coerced to commit – or more precisely, the crime that the prosecution chooses to charge – includes an element as to which a court can say that duress would negate the element.

The likelihood of inconsistent and unreliable jury verdicts should persuade the Court to adhere to the established rules of federal criminal practice that have uniformly placed the burden of persuasion on the government when the defendant satisfies the burden of production on a duress defense. Nothing suggests that adherence to this tradition has created any difficulty in the fair enforcement of the criminal laws.

## STATEMENT OF THE CASE

The NACDL and the NCDBW adopt the Statement of the Case in petitioner's brief.

## ARGUMENT

### I. DURESS IS A WELL-ESTABLISHED DEFENSE AS TO WHICH THE GOVERNMENT TRADITIONALLY BEARS THE BURDEN OF PROOF.

Duress "excuse[s] criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." *United States v. Bailey*, 444 U.S. 94, 409 (1980). Duress has long been recognized as a defense in the federal courts. S. REP. 96-553, at 105 (1980), citing, *e.g.*, *Kawakita v. United States*, 343 U.S. 717, 735-36 (1952); *United States v. Vigol*, 2 Dall. 346, 28 F. Cas. 376 (C.C.D. Pa. 1795). "At common law, as under Federal law today, duress is recognized as a defense to all crimes except murder and, perhaps, offenses involving an intent to take life

such as attempted murder or assault with intent to kill." S. REP. 96-553, at 105 (footnote omitted).

This Court has remarked that "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man." *Powell v. Texas*, 392 U.S. 514, 536 (1968). And this Court expressly recognized that duress is a defense to federal crimes in *United States v. Bailey*, 444 U.S. at 409. The Court held in *Bailey* that one charged with the statutory crime of escape may assert duress as a defense, upon showing that a threat existed and that, "given the imminence of the threat, . . . [escape] was his only reasonable alternative." 444 U.S. at 410-11 (citations omitted).

The defense may be asserted, the Court held, despite the statute's silence on the availability of common-law defenses and the absence of a required *mens rea* element to which a duress defense would directly speak:

> [W]e are construing an Act of Congress, not drafting it. The statute itself . . . requires no heightened *mens rea* that might be negated by any defense of duress or coercion. We nonetheless recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted [the escape statute]. . . .

*Bailey*, 444 U.S. at 415 n.11. *See Jones v. United States*, 526 U.S. 227, 234 (1999) (statutes are drafted "against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts"). In enacting the criminal prohibition, this Court in *Bailey*

reasoned, Congress is deemed (absent clear evidence to the contrary) to have adopted implicitly the body of traditional defenses, which have historically been viewed as negating true culpability. *See also, e.g., United States v. Russell*, 411 U.S. 423, 428-35 (1973); *Sorrells v. United States*, 287 U.S. 435, 446-52 (1932) (same theory elaborated at length and applied to entrapment).

So too, when Congress enacted the Federal Gun Control Act of 1968, it "legislate[d] against a background of Anglo-Saxon common law," such that duress is a defense to the crimes of knowingly making false statements "intended or likely to deceive" in acquiring or attempting to acquire a firearm, 18 U.S.C. §§ 922(a)(6), 924(a)(2), and willful possession of a firearm by one who is under indictment, 18 U.S.C. §§ 922(n), 924(a)(1)(D), the offenses of which petitioner Dixon was convicted.

Duress has been analogized to insanity, as to which this Court has long held that the government bears the ultimate burden of persuasion once the accused has offered some evidence to overcome the presumption of sanity. *See Davis v. United States*, 160 U.S. 469, 488 (1895). Both defenses speak to the accused's mental state, as well as to her blameworthiness. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 483 n.112 (1989) (hereinafter *Reasonable Doubt*) ("[d]efendants who act out of duress, necessity, or insanity can argue that their acts were involuntary because they lacked either the capacity or the chance to choose a lawful alternative"). As the Ninth Circuit confirmed in an oft-cited case:

> A defendant who, without opportunity to escape, has a well grounded fear of imminent death or serious injury unless he complies with his captor's wrongful commands entertains a mental state recognized as

> exculpatory with respect to most crimes. Compulsion or duress producing this state of mind is a defense to most criminal accusations.
>
> * * * *
>
> We indulge in the assumption that every defendant is sane, and it is not incumbent upon the prosecution to prove sanity until the defense presents evidence to the contrary. "But once substantial evidence of insanity is received in evidence, the presumption of sanity disappears. The burden is then placed upon the prosecution to prove legal sanity beyond a reasonable doubt, as in the case of any essential element of the crime charged." The same considerations apply to the even rarer defense of duress. . . .

*United States v. Hearst*, 563 F.2d 1331, 1335-36 nn.1 & 2 (9th Cir. 1977) (*per curiam*) (citations omitted).

Duress is also closely related to self-defense. *E.g.*, *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996). "The two defenses are similar in that they require a defendant to demonstrate that she acted reasonably in response to a reasonable fear of death or bodily injury." *United States v. Marenghi*, 893 F. Supp. 85, 95 (D. Me. 1995). When self-defense is raised in a federal criminal trial, it is also well-settled that the government bears the burden of persuasion to disprove that defense beyond a reasonable doubt. *E.g.*, *United States v. Alvarez*, 755 F.2d 830, 842-43 (11th Cir. 1985) (citing cases spanning more than half a century). *See also Mullaney v. Wilbur*, 421 U.S. 684, 702 n.30 (1975) (acknowledging this as "the 'majority rule'" for self-defense).

And this is so despite the constitutional minimum standard preserved in such cases arising in the state courts as *Patterson*

*v. New York*, 432 U.S. 197 (1977), and *Martin v. Ohio*, 480 U.S. 228 (1987). While "the absence of self-defense is not an element of the crime" and the defendant properly bears the burden of production, "[i]n a federal prosecution ... once the defendant has met the burden of production, the government must satisfy the burden of persuasion and must negate self-defense beyond a reasonable doubt." *Alvarez*, 755 F.2d at 842 n.12 (citation omitted). In the Model Penal Code, which the Court found useful when addressing duress in *Bailey*, 444 U.S. at 403-04, 410, the American Law Institute recommended adoption of the federal rule for burdens of proof on defenses:

> The initial evidential burden is thus placed on the defendant. The defense is not in issue in the case without supporting evidence. But when there is such evidence (whether adduced by the prosecution or defendant) the prosecution must discharge its normal burden, disproving the defense beyond a reasonable doubt.
>
> Affirmative defenses in this sense have been and are extremely common in the penal law. Typical illustrations are: self-defense and similar claims of justification for conduct that would otherwise be criminal; necessity, duress and claim of right ....

AMERICAN LAW INSTITUTE, VOL. 1, MODEL PENAL CODE & COMMENTARIES: OFFICIAL DRAFT AND REVISED COMMENTS 192-93 (1985) (footnotes omitted). "[I]t seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt." *Id.* at 197 (quoting

C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 684 (1954)).[2]

So it is that "[o]nce the defendant has placed before the court evidence sufficient to raise the issue, the government must rebut the defense beyond a reasonable doubt." 1A K. O'Malley, J. Grenig & W. Lee, FED. JURY PRAC. & INSTR. § 19.02, at 746 (5th ed. 2000) (citation omitted). This may be accomplished by disproof of "at least [one] element of that defense beyond a reasonable doubt." *Id.* (citation omitted). Similarly, the report of the Judicial Conference Subcommittee on Pattern Jury Instructions placed the burden of persuasion on the government to disprove duress beyond a reasonable doubt. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS, instr. no. 56, at 68 (1987).[3]

That burden placement is well supported in the case law concerning duress. *United States v. Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996) ("[w]hen a predicate warranting a duress instruction has been laid, the government is saddled with the additional burden of showing beyond a reasonable doubt that a defendant's criminal acts were not the product of duress") (citation omitted); *United States v. Simpson*, 979 F.2d 1282, 1287 (8th Cir. 1992) ("[o]nce the defendant introduces evidence sufficient to submit the defense of coercion to the jury, the

2. This Court has previously looked to the Model Penal Code for guidance when Congress has been silent on a substantive question of basic criminal law. *United States v. Gypsum Co.*, 438 U.S. 422, 437-38 (1978); *Barnes v. United States*, 412 U.S. 837, 845 (1973); *Turner v. United States*, 396 U.S. 398, 416 & n. 29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969).

3. The pattern instructions in the various Circuits do not speak with a single voice, but many follow the Federal Judicial Center's lead in placing the burden of persuasion on the government when duress is properly raised by a defendant. *United States v. Dodd*, 225 F.3d 340, 349 n.8 (3d Cir. 2000) (survey of Circuit pattern instructions).

government must prove beyond a reasonable doubt that the defendant's acts were not coerced") (citation omitted); *United States v. Santos*, 932 F.2d 244, 249 (3d Cir. 1991) (accepting government's concession that prosecution "should from the outset bear the burden of disproving duress beyond a reasonable doubt once the defendant has introduced sufficient evidence concerning each element of the defense"); *United States v. Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983) ("in federal criminal trials the Government's burden in disproving at least one element of duress should be proof beyond a reasonable doubt"); *United States v. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982) ("[d]efendant's burden of going forward to introduce sufficient facts to support an instruction on a coercion defense in no way altered the government's obligation to prove willfulness beyond a reasonable doubt"; "the prosecution must rebut the issues of coercion beyond a reasonable doubt") (citations omitted); *United States v. Campbell*, 609 F.2d 922, 925 (8th Cir. 1979) (once defendant presents evidence of coercion in escape case, "the prosecution must rebut the issues of coercion beyond a reasonable doubt"); *United States v. Hearst*, 563 F.2d at 1336 & n.2 (once duress is raised and supported by evidence, government bears the burden of persuasion to negate defense). *See also United States v. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996) (because justification is not defined in the federal criminal code as a defense to possession of a firearm by a convicted felon, the courts may not allocate to defendant the burden of proof on that defense). The military courts apply the same rule, placing the burden on the prosecution to disprove duress beyond a reasonable doubt. *United States v. Barnes*, 60 M.J. 950, 955 (N.M. Ct. Crim. App. 2005) ("[w]hen there is some evidence that the accused acted under duress, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense of duress does not exist") (citation omitted).

As the Second Circuit observed in *Mitchell*, placing the burden of persuasion on the government makes eminent good sense, even "[a]part from constitutional concerns":

> [A] reasonable doubt standard for duress will lessen the risk that a jury will convict solely because of failure of a defense, a consideration we have previously stressed in formulating federal rules of practice for jury instructions. We are not persuaded that juror confusion may be avoided simply by adding an admonition that, regardless of whether the jury disbelieves the duress evidence, the burden remains on the Government to establish every element of the crime beyond a reasonable doubt.
>
> Furthermore, we see no reason peculiar to the duress defense warranting departure from the general federal practice that once a criminal defendant satisfies an initial burden of producing sufficient evidence to warrant submission of a substantive defense to the jury, the prosecution must disprove at least an element of that defense beyond a reasonable doubt.

725 F.2d at 836 (citations and footnote omitted).[4]

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4. The court noted that several states imposed the burden of persuasion on the government (although others did not). *Id.* at 836 n.7 (collecting cases). That remains so today. Numerous state courts rely on constitutional, statutory, and common-law bases to hold that the prosecution bears the burden of persuasion once the defendant goes forward with a duress defense. *State v. Rouleau*, 204 Conn. 240, 252-53, 528 A.2d 343, 349-50 (1987) (state constitutionally must disprove duress beyond a reasonable doubt); *State v. Glidden*, 487 A.2d 642, 644 (1985) (prosecution "bear[s] the ultimate burden" if defendant produces evidence to support a duress defense under allocation statute); *People v. Terry*, 224 Mich.App. 447, 453-54, 569 N.W.2d 641, 645 (1997)

(Cont'd)

On this issue, concerns about the reliability of criminal verdicts support the traditional federal rule. The government, not the defendant, must bear the burden of proof on the duress defense.[5]

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(Cont'd)

("[o]nce a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress") (citation omitted); *State v. Romano*, 355 N.J.Super. 21, 35-36, 809 A.2d 158, 166-67 (2002) (statutory allocation of burdens requires prosecution to disprove duress beyond a reasonable doubt); *Commonwealth v. Morningwake*, 407 Pa.Super. 129, 139-40, 595 A.2d 158, 163 (1991) (prosecution must disprove duress beyond a reasonable doubt); *Moes v. State*, 91 Wis.2d 756, 767-68, 284 N.W.2d 66, 70-72 (1979) (state common law requires prosecution to disprove duress beyond a reasonable doubt). *Contra, e.g., State v. Jeffrey*, 203 Ariz. 111, 114, 50 P.3d 861, 864 (2002) (prosecution need not disprove duress beyond a reasonable doubt). The Model Penal Code comments counted as evenly split (9-8) in 1985 the states that had addressed the issue by statute. AMERICAN LAW INSTITUTE, *supra*, at 384 nn.66-67.

5. One aspect of petitioner Dixon's trial that, while not before the Court on certiorari, was central to the fairness of her trial, highlights the reliability concerns in this case: Ms. Dixon was not allowed to introduce expert testimony about her experiences of abuse at the hands of her "boyfriend." Without an expert to provide needed context about what the social sciences have to teach about battering and its effects, many abused women are misunderstood and perceived as responsible for their own victimization. Such misconceptions often interfere with the ability of both judges and juries to give battered women the full and fair benefit of legal rules and doctrines applicable to all defendants. Without expert testimony providing this needed context, a battered woman's failure to leave her batterer at some earlier time can wrongly imply that she *voluntarily participated* and unreasonably, recklessly (or even willfully) assumed the risk of any subsequent duress imposed upon her to commit a crime for the benefit of the batterer. U.S. Dept of Justice (Office of Justice Programs, Nat'l Inst. of Justice),

(Cont'd)

## II. THE PRACTICAL CONSIDERATIONS UPON WHICH THE FIFTH AND NINTH CIRCUITS HAVE RELIED DO NOT JUSTIFY DEPARTING FROM THE TRADITIONAL RULE THAT THE GOVERNMENT BEARS THE BURDEN OF PROOF.

The Fifth Circuit's decision in *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994), upon which that court relied to reject petitioner Dixon's instruction claim, departed from the settled federal rule. Instead, it adopted the approach first promulgated in *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991) (*per curiam*). "Since a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant" and the defendant must therefore prove "each element of the defense by a preponderance of the evidence." *Willis*, 38 F.3d at 179 & n.12 (citation omitted).[6]

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(Cont'd)

*et al.*, The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (May 1996), reprinting Gordon & Dutton, Validity of 'Battered Woman Syndrome' in Criminal Cases Involving Battered Women 20-22 & n.90; and Parrish, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases 27, 29-30 (surveying use of experts in such cases by prosecution and defense to "dispel myths and misconceptions"), available at *www.ncjrs.org/pdffiles/batter.pdf*. Against that background – which by itself generated a significant risk of juror confusion – the Fifth Circuit's refusal to hold the government to its burden of proof rendered even more acute the potential for a wrongful conviction.

6. By contrast to the long-established and well-articulated traditional rule, the Fifth Circuit rule applied below is only thinly rationalized and of uncertain origin. In *Willis*, the defendant made a plain-error argument on appeal that the duress instruction "was erroneous because it did not state that the burden of proof on the defendant was a preponderance of the evidence" and could have suggested to the jury

(Cont'd)

*Dominguez-Mestas* arose from a conviction for heroin importation. 929 F.2d at 1380. The defendant, a Mexican national, asserted that he had brought the heroin into the United States because he and his sister had been threatened with death. *Id.* at 1380-81. After holding that due process, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), does not require the government to bear the burden of persuasion on a duress defense because duress does not negate an element, *see, e.g.*, *Patterson v. New York*, 432 U.S. 197, 205-06 (1977), the Ninth Circuit distanced itself from its earlier *Hearst* decision and held that the defendant should be required to carry the ultimate burden. 929 F.2d at 1382-84. The court's rationale was:

> To require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy. In many cases, as in the case before us, the sole evidence of duress is the testimony offered by the defendant. Often, as here, those to whom the defendant refers either cannot be located or are outside the United States and not subject to subpoena power. In such cases, the government cannot possibly meet its burden of proving the absence of duress beyond a reasonable doubt. . . .

(Cont'd)

that he was required to prove duress beyond a reasonable doubt. 38 F.3d at 179. The court first held that "[s]ince a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant," *id.*, citing *United States v. Gant*, 691 F.2d 1159, 1165 (5th Cir. 1982). But *Gant* holds only, and uncontroversially, that the defendant bears the initial burden of production. (In addition, most scholars categorize duress as an "excuse," because it affects volition, not as a "justification.") The second sentence of the two-sentence *Willis* holding is: "To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." 38 F.3d at 179. No direct authority is cited for this proposition at all. In a footnote, the court cited *Dominguez-Mestas*, apparently with approval, but did not expressly adopt the Ninth Circuit's formulation.

> Finally, requiring the government to prove the absence of duress beyond a reasonable doubt would create a potential for abuse. Because it is extremely difficult for the government to prove the absence of duress beyond a reasonable doubt, a burden which is heightened in the context of border cases, the standard invites a defendant to tell a tale of duress, thereby placing a nearly insurmountable burden on the government. . . .

*Id.* at 1384.

The Ninth Circuit's justification for imposing the burden of proof on the defendant in a duress case fails to acknowledge that much of that justification – excepting perhaps cross-border issues – could be said, for example, of self-defense. That is, the defendant is usually the primary, if not the only, witness to testify to a reasonable fear of injury or death, and the government must make use of cross-examination or other evidence to refute such testimony. Yet, since the advent of this Court's 1895 decision in *Davis v. United States*, "federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried this burden of production," without there being any "noticeable handicap to effective law enforcement." *Patterson v. New York*, 432 U.S. at 231-32 (citations omitted) (Powell, J., dissenting). The same kind of appeal to "mere convenience" was rejected by this Court in *Sorrells* in 1932. *See* 287 U.S. at 451. Instead, declared Chief Justice Hughes's majority opinion, "the essential demands of justice" must prevail. *Id.*

Moreover, shifting the burden of persuasion to the defendant is a classic instance of overreacting to a perceived problem. All of the factors cited by the Fifth and Ninth Circuits to justify shifting the burden – most notably that a defendant who was allegedly coerced by shady characters in another country, whom

he cannot produce and whom the government obviously could not locate and compel to be present – are fertile fields to be plowed on cross-examination. *See California v. Green*, 399 U.S. 149, 158 (1970) (cross-examination is the "greatest legal engine ever invented for the discovery of truth") (quoting 5 Wigmore, EVIDENCE § 1367 (1940 ed.)). The mythical defendant created by the court in *Dominguez-Mestas* would likely be skewered on cross-examination with the very concerns that led the court to shift the burden, and juries who are familiar with local issues, such as cross-border crimes, are most unlikely to be fooled by a defendant who invokes phantom threats. The abusive "boyfriend" in petitioner Dixon's case, by way of contrast, was very real, and could be called as a witness by ether side, as were the sellers of various firearms who observed Ms. Dixon's demeanor.

The notion that maintaining the burden on the government is unfair because the prosecution will be hard pressed to negate the defendant's proffered state of mind at the time of the crime was rejected in *Mullaney*. The Court noted that requiring the prosecution to prove an "absence of passion" in a murder conviction, after the defendant had raised that defense and satisfied the burden of production, is no more unfair than requiring the prosecution to prove the absence of self-defense. 421 U.S. at 701-02. "Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation," the Court added. *Id.* Thus, the Court "discern[ed] no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability." *Id. See also id.* at 702 n.31 (discussing *Davis*).

The concerns expressed in *Dominguez-Mestas* are more ephemeral than real. As one commentator has observed in addressing the district court's decision in that case:

> If the government were required to prove the lack of duress solely from its own direct evidence, the court's reasoning would be valid. The effect of requiring the defendant to bring some evidence forward to meet the burden of production coupled with the jury's critical eye, however, makes the government's task far from "impossible." The government through cross-examination and analysis of the evidence, circumstantial evidence, and logical inferences still has ample opportunity to show that no reasonable doubt exists based on the totality of the evidence presented. The real question at issue is not an evidentiary problem unique to duress, but the question inherent to the presumption of innocence: given that facts often cannot be conclusively proved, who should bear the risk of an erroneous finding.

*Reasonable Doubt*, *supra*, at 501 n.166. *See also Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994) (rejecting similar argument with respect to difficulty of proving defendant's knowledge).

In short, the only rationale offered in the cases relied upon by the Fifth Circuit for shifting the burden to the defendant is convenience to the prosecution. That justification not only is insubstantial but also has long been rejected by this Court.

## III. THERE IS NO JUSTIFICATION FOR ASSIGNING THE BURDEN OF PROOF ON THE BASIS OF WHETHER DURESS "NEGATES" A SPECIFIC INTENT ELEMENT AND DOING SO LEADS TO ARBITRARY AND ILLOGICAL RESULTS.

Despite their logical and historical weaknesses, *Dominguez-Mestas* and *Willis* have engendered a series of decisions in which certain courts have engaged in increasingly intricate analyses of given statutes to determine the appropriate burden placement in particular cases. There is suddenly "a quite divided jurisprudence" in the federal courts and no "clear default rule as to how affirmative defenses generally should be treated." *Dodd*, 225 F.3d at 348. Many of these cases confuse the *mens rea* elements of offenses with traditional defenses in the nature of excuses or justifications.

For example, invoking "practical considerations" similar to those set forth in *Dominguez-Mestas*, the Eleventh Circuit has recently held that a defendant who raises a "justification" defense to a charge of possession of a firearm by a convicted felon bears the burden of persuasion. *United States v. Deleveaux*, 205 F.3d 1292, 1299-1301 (11th Cir. 2000); *accord*, *Dodd*, 225 F.3d at 347-48; *United States v. Newcomb*, 6 F.3d 1129, 1133 (6th Cir. 1993). The Ninth Circuit, addressing a charge of attempted transportation of undocumented aliens, acknowledged that an attempt charge requires specific intent to commit the underlying crime (and that the underlying crime also required specific intent), but nonetheless held that the defendant bore the burden of persuasion on his duress defense because duress would not rebut the *particular* intent elements supposedly implicated in that case. *United States v. Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999) ("[i]n order to determine whether there has been an impermissible shifting of the burden of persuasion . . . we must decide 'whether proof of duress necessarily entails disproof' of the mens rea required" for the

charged offense). And the Ninth Circuit, addressing a duress defense raised by a defendant charged with attempted illegal entry, which is a specific intent crime, in another recent decision, similarly parsed the crime's elements to determine whether duress "negated the specific intent element of attempted illegal reentry . . . or whether it could only be offered to excuse his criminal conduct"; the court there held that duress "could only be offered to excuse the offense," and therefore placed the burden of persuasion on the defendant. *United States v. Leal-Cruz*, 431 F.3d 667, 671-73 (9th Cir. 2005).

The mechanical focus on elements to determine the burden of proof on a duress defense complicates and confuses what had been reasonably well settled, skews the defense, and leads to the risk of unreliable jury verdicts. The same threatening and abusive conduct that causes a defendant to commit a crime will lead to disparate results, depending on the fortuity of whether the coerced criminal act violates a statute that a court ultimately determines includes an element that is "negated" by duress. That is, if a woman, such as petitioner Dixon, were to be threatened in precisely the manner that she asserts she was, but was forced instead to commit what is clearly a specific intent crime, such as bank robbery, 18 U.S.C. § 2113, the government would have the burden of persuasion on duress, even in the Fifth Circuit.[7] But, if the same threatening conduct forces a person to commit a crime that is determined to require a mental state that is not "negated" by duress, such as the knowledge that is typical of "general intent," the *defendant* must bear the burden of persuasion. And, if the evidence is in equipoise in both instances, the first defendant would be acquitted and the second would be

7. Of course, if the theory were correct that duress negates *scienter* in crimes of specific intent, then "duress" in such cases would not be classifiable as an affirmative defense at all. The "rule" announced in those cases really says only that when the defendant offers evidence relevant to intent, the burden of proof remains on the government.

convicted – when the quantum of evidence showing that they both were coerced was exactly the same. That sort of disparate treatment simply makes no sense.

Indeed, an even more bizarre scenario unfolds when a defendant is charged with two (or more) offenses in the same indictment and the burden of persuasion varies as to different charges. This case presents just such a possibility: the charge of possessing a firearm while under indictment requires that the act be performed "willfully," 18 U.S.C. § 922(n); 18 U.S.C. § 924(a)(1)(D); but the charge of making false statements requires only that she did so "knowingly." 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(2). *See generally Bryan v. United States*, 524 U.S. 184 (1998) (discussing varying scienter elements under Gun Control Act, as amended). In this instance, under the approach taken by some courts, the jury would presumably have to be instructed that the government bears the burden of persuasion on the one charge, and the defendant on the others. The potential for jurors to be confused is self-evident.

This Court observed in *Mullaney* that "[t]he result, . . . where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous . . . conviction." 421 U.S. at 701. Quoting from *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), the Court continued:

> [W]here one party has at stake an interest of transcending value – as a criminal defendant his liberty – th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial.

421 U.S. at 701 (brackets in original).

Under federal civil statutes that fail to clarify the allocation of burden, this Court has applied a "default rule," *Schaffer ex*

*rel. Schaffer v. Weast*, 546 U.S. —, 126 S. Ct. 528, 534 (2005), subject to exceptions based on "policy considerations, convenience, and fairness," *id.* at 537 (Stevens, J., concurring), 537-38 (Ginsburg, J., dissenting) (quoting 2 J. Strong, McCormick on Evidence § 337, at 415 (5th ed. 1999) and 9 J. Wigmore, Evidence § 2486, at 291 (J. Chadbourn rev. ed. 1981)). As the Court recognized, however, "special concerns attend" the allocation of burdens in criminal cases. *Schaffer*, 126 S. Ct. at 535 (quoting *Lavine v. Milne*, 424 U.S. 577, 585 (1976)). With "convenience" discounted, as already discussed in Point II, "policy considerations" and "fairness" as applied to the criminal law defense of duress likewise favor the traditional uniform federal rule, which *always* places the ultimate burden on the prosecution beyond a reasonable doubt.

The reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 362 (1970). The traditional approach of the federal courts to the burden of persuasion when duress and similar defenses are raised by a defendant pays heed to that concern, constitutional issues aside. The element-by-element approach propounded by the Ninth Circuit and adopted recently in several other circuits is rife with the potential for hopeless confusion, leading to unreliable and unfairly disparate jury determinations. The correct rule is simple, clear and applies to all cases.

This Court recognized in *Bailey* that the common-law duress defense is woven into federal criminal statutes. The Fifth Circuit's rule thwarts that Congressional intent by stripping the defense of its vitality and burdening it with confusion and inconsistency. The NACDL and NCDBW urge the Court to reverse the Fifth Circuit's decision and reaffirm the ultimate burden of proof beyond a reasonable doubt to the proof of all issues attending culpability in federal criminal cases.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 28 2006
OFFICE OF THE CLERK

No. 05-7053

IN THE

# Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## JOINT APPENDIX

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February 27, 2006

**PETITION FOR CERTIORARI FILED OCTOBER 17, 2005**
**CERTIORARI GRANTED JANUARY 13, 2006**

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NOTICE

The following document has been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-7053 Petition For A Writ Of Certiorari.

*United States* v. *Dixon*, No. 04-10250 (5th Cir. July 20, 2005) (order denying pet. for reh'g en banc)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

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USA,

*Plaintiff,*

v.

DIXON,

*Defendant.*

---

No. 3:03-mj-0024

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**DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | * * * * |
| 3/5/2003 | 11 | INDICTMENT as to Keshia Cherie Dixon (1) count(s) 1, 2-9. (lmr,) (Entered: 3/6/2003) |
| | | * * * * |
| 3/19/2003 | 13 | Minute Entry for proceedings held before Judge Jorge A Solis: Arraignment as to Keshia Cherie Dixon (1) Count 1, 2-9 held on 3/19/2003., Plea entered by Keshia Cherie Dixon (1) Count 1, 2-9 by Keshia Cherie Dixon: Not Guilty on counts 1-9. (Court Reporter Pam Wilson.) (jrb,) (Entered: 3/20/2003) |
| | | * * * * |
| 8/11/2003 | 62 | Requested Jury Instructions by Keshia Cherie Dixon. (attachments not imaged) (lmr,) (Entered: 8/12/2003) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/11/2003 | 63 | MOTION for Continuance (of trial) by USA as to Keshia Cherie Dixon (lmr,) (Entered: 8/12/2003) |
| | | * * * * |
| 8/19/2003 | 75 | ORDER granting [63] Motion to Continue as to Keshia Cherie Dixon (1). The Court will issue a separate order setting the case from trial and final pretrial conference. (see order for specifics) (Signed by Judge Jorge A Solis on 08/19/03) (lmr,) (Entered: 8/20/2003) |
| 8/22/2003 | 76 | ORDER RESCHEDULING TRIAL as to Keshia Cherie Dixon : Jury Trial set for 11/17/2003 08:45 AM before Jorge A Solis. Pretrial Conference set for 11/5/2003 03:00 PM before Jorge A Solis. The defendant need not be present for the pretrial conference. (Signed by Judge Jorge A Solis on 08/19/03) (lmr,) (Entered: 8/21/2003) |
| | | * * * * |
| 10/24/2003 | 80 | Sealed Document (svc,) (Entered: 10/27/2003) |
| 10/24/2003 | 81 | MOTION for Compulsory Examination By Government Expert by USA as to Keshia Cherie Dixon. (lmr,) (Entered: 10/27/2003) |
| | | * * * * |
| 10/29/2003 | 83 | APPLICATION FOR WRIT OF HABEAS CORPUS, ORDER, AND WRIT ISSUED as to Thomas Wright Jr to Appear on November 17, 2003 at 9:00 am for testimony in the trial. Issued Writ of Habeas Corpus |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Ad Testificandum. (see order for specifics) (Signed by Judge Jorge A Solis on 10/29/03) (lmr,) (Entered: 10/30/2003) |
| 10/29/2003 | 84 | APPLICATION FOR WRIT OF HABEAS CORPUS, ORDER, AND WRIT ISSUED as to Tyshon Deon Hillary to Appear on November 17, 2003 at 9:00am for testimony in trial. Issued Writ of Habeas Corpus Ad Testificandum. (Signed by Judge Jorge A Solis on 10/28/03) (lmr,) (Entered: 10/30/2003) |
| 10/30/2003 | 86 | RESPONSE and Objections to Government's [81] MOTION for Compulsory Examination By Government Expert by Keshia Cherie Dixon. (lmr,) (Entered: 10/31/2003) |
| 11/10/2003 | 87 | ORDER granting [81] Motion for Compulsory Examination By Government Expert as to Keshia Cherie Dixon (1). It is ordered that Keshia Cherie Ashford Dixon submit to a psychiatric examination by the government's expert, Dr. Richard Coons. Failure of defendnat Keshia Dixon to submit to an examination by Dr. Coons may result in the exclusion of any testimony from Defendant's expert, Dr. Toby Myers. Ms. Dixon is directed to submit to an examination by Dr. Coons as set forth above before the start of of her trial on November 17, 2003. (see order for specifics) (Signed by Judge Jorge A Solis on 11/10/03) (lmr.) (Entered: 11/12/2003) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | * * * * |
| 11/12/2003 | 92 | Minute Entry for Pretrial Conference held before Judge Jorge A Solis: as to Keshia Cherie Dixon held on 11/12/03. (Court Reporter Linda Robbins.) (svc,) (Entered: 11/14/2003) |
| | | * * * * |
| 11/17/2003 | 96 | Minute Entry for proceedings held before Judge Jorge A Solis: Jury Trial as to Keshia Cherie Dixon held on 11/17/03., Voir Dire begun on 11/17/2003 as to Keshia Cherie Dixon (1) on Count 1, 2-9. (Court Reporter Shawn McRoberts.) (lmr,) (Entered: 11/24/2003) |
| 11/17/2003 | 97 | Minute Entry for proceedings held before Judge Jorge A Solis: Day 2 of Jury Trial as to Keshia Cherie Dixon held on 11/18/03. (Court Reporter Shawn McRoberts.) (lmr,) (Entered: 11/24/2003) |
| | | * * * * |
| 11/19/2003 | 98 | Minute Entry for proceedings held before Judge Jorge A Solis: Day 3 of Jury Trial as to Keshia Cherie Dixon held on 11/19/03. (Court Reporter Shawn McRoberts.) (lmr,) (Entered: 11/24/2003) |
| 11/20/2003 | 99 | Minute Entry for proceedings held before Judge Jorge A Solis: Day 4 of Jury Trial as to Keshia Cherie Dixon held on 11/20/03. (Court Reporter Shawn McRoberts.) (lmr,) (Entered: 11/24/2003) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/20/2003 | 101 | Jury Charge as to Keshia Cherie Dixon. Signed by Judge Jorge A Solis on 11/20/03. (lmr,) (Entered: 11/24/2003) |
| 11/20/2003 | 102 | JURY VERDICT FORM as to Keshia Cherie Dixon (1) Guilty on Count 1, 2-9. (lmr,) (Entered: 11/24/2003) |
| | | * * * * |
| 2/18/2004 | 112 | Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 2/18/2004 for Keshia Cherie Dixon (1), Count(s) 1, 2-9, Defendant committed to BOP for a term of 34 months; S/R 3 years; SA $900.00. (Court Reporter Pam Wilson.) (lmr,) (Entered: 2/19/2004) |
| 2/23/2004 | 113 | JUDGMENT as to Keshia Cherie Dixon (1). Count(s) 1, 2-9. Defendant committed to BOP for a term of 34 months; S/R 3 years; SA $900.00. This sentence is to be served consecutively to the sentence imposed in Case No. 3:01cr385-P(2). Defendant is to given credit for time served after the completion of sentence in Case No. 3:01cr385-P(2). (see judgment for specifics) (Signed by Judge Jorge A Solis on 02/23/04) (lmr,) (Entered: 2/25/2004) |
| 2/27/2004 | 114 | NOTICE OF APPEAL by Keshia Cherie Dixon re [113] Judgment. No fee pd/TOOC (svc,) (Entered: 3/1/2004) |
| | | * * * * |

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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04-10250

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

KESHIA CHERIE ASHFORD DIXON,
*Defendant-Appellant.*

---

## DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 3/4/04 | Direct criminal case docketed. NOA filed by Appellant Keshia Cherie Ashford Dixon. [04-10250] (trm) |
| 3/15/04 | Appearance form filed by Susan B Cowger for Appellee USA. [04-10250] (trm) |
| 3/16/04 | Appearance form filed by J Craig Jett for Appellant Keshia Cherie Ashford Dixon. [04-10250] (trm) |
| 3/19/04 | 3 transcript orders received from Appellant Keshia Cherie Ashford Dixon for Court Reporter Pamela J Wilson, Court Reporter Shawn McRoberts, Court Reporter Linda J Robbins Date of Hearing: 2/18/04 (Sentencing) - Pamela J Wilson; 8/7/03 (Pretrial Conference) and 11/17/03 - 11/20/03 (Trial) - Shawn McRoberts; 11/12/03 (Pretrial Conference) - Linda J Robbins. [04-10250] Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 4/5/04 for Linda J Robbins, for Shawn McRoberts, for Pamela J Wilson. (mfn) |

| DATE | PROCEEDINGS |
|---|---|
| 3/24/04 | Criminal Justice Act 20 voucher issued to J Craig Jett for Appellant Keshia Cherie Ashford Dixon . [04-10250] (jar) |
| 4/5/04 | Transcript order acknowledgment received from Court Reporter Shawn McRoberts. Estimated pages: 500 Date Financial Arrangements Made: 3/12/04 [04-10250] Ct. Reporter Acknowledgment ddl satisfied. Transcript due on 5/11/04 for Shawn McRoberts. Ct. Reporter Discount Date is 5/11/04 for Shawn McRoberts. (mfn) |
| 4/9/04 | Transcript order acknowledgment received from Court Reporter Linda J Robbins. Estimated pages: 60 Date Financial Arrangements Made: 4/1/04 [04-10250] Ct. Reporter Acknowledgment ddl satisfied. Transcript due on 5/3/04 for Linda J Robbins. Ct. Reporter Discount Date is 6/1/04 for Linda J Robbins. (mfn) |
| 4/13/04 | Transcript filed in district court by Court Reporter Pamela J Wilson on 4/9/04. [04-10250] Ct. Reporter Acknowledgment ddl canceled. (cvt) |
| 6/7/04 | Transcript filed in district court by Court Reporter Shawn McRoberts on 5/26/04. [04-10250] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. (mfn) |
| 6/24/04 | Transcript filed in district court by Court Reporter Linda J Robbins on 6/18/04. [04-10250] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. ROA due on 7/6/04. (mfn) |
| 6/29/04 | Record on appeal filed. Vol(s) of Pleadings: 2 Vol(s) of Transcripts: 7 SEALED: 1 env (PSI). [04-10250] ROA ddl satisfied. (jca) |

| DATE | PROCEEDINGS |
|---|---|
| 7/6/04 | Briefing notice issued. [04-10250] A/Pet's Brief due on 8/16/04 for Keshia Cherie Ashford Dixon. (jca) |
| 7/6/04 | Record on appeal released to attorney J Craig Jett for Appellant Keshia Cherie Ashford Dixon. Volumes: 9. [04-10250] (jca) |
| 8/12/04 | Extension granted by phone until: 9/15/04 to file appellant's brief for Appellant Keshia Cherie Ashford Dixon. [04-10250] (ksw) |
| 8/16/04 | Confirmation letter filed by Appellant Keshia Cherie Ashford Dixon confirming an extension of time to and including 9/15/04 for filing appellant's brief. Sufficient [Y/N]: y [04-10250] A/Pet's Brief ddl updated to 9/15/04 for Keshia Cherie Ashford Dixon. (trm) |
| 9/13/04 | Supplemental record on appeal filed. Supplement #: 1 Vol(s) of Pleadings: 1 [04-10250] (ddv) |
| 9/17/04 | Record on appeal released to attorney J Craig Jett for Appellant Keshia Cherie Ashford Dixon. Supplemental Volumes: 1. [04-10250] (ddv) |
| 9/20/04 | Supplemental record on appeal filed. Supplement #: 2 Vol(s) of Pleadings: 1 [04-10250] (tdb) |
| 9/20/04 | Record excerpts filed by Appellant Keshia Cherie Ashford Dixon # of copies: 4 Sufficient [Y/N]: Y. [04-10250] (wdc) |
| 9/20/04 | Unopposed motion filed by Appellant Keshia Cherie Ashford Dixon to file brief in excess of the word count limitation but not to exceed 15,495 words. [4958837-1] Date of COS: 9/15/04 Sufficient [Y/N]: y [04-10250] (rff) |

| DATE | PROCEEDINGS |
|---|---|
| 9/20/04 | Appellant's Brief filed by Appellant Keshia Cherie Ashford Dixon. Copies of Brief: 7 # of pages: 61 Word count: 15,495 Date of COS: 9/15/04 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: n EXCEEDS WORD & PAGE COUNT LIMITATION (MOTION PENDING). [4960823-1] [04-10250] A/Pet's Brief ddl satisfied. Sufficient Brief due on 10/12/04 for Keshia Cherie Ashford Dixon. (jca) |
| 9/23/04 | Appearance form filed by Renee Harris Toliver for Appellee USA. [04-10250] (trm) |
| 9/23/04 | The attorney Susan B Cowger for USA not participating in case. [04-10250] (trm) |
| 9/28/04 | Record on appeal forwarded by J Craig Jett for Appellant Keshia Cherie Ashford Dixon to Renee Harris Toliver for Appellee USA . Supplemental Volumes: 1 [04 10250] (trm) |
| 10/1/04 | CLERK Order filed granting Appellant's unopposed motion to file brief in excess of the word count limitation [4958837-1] Copies to all counsel. [04-10250] (trm) |
| 10/1/04 | Brief made sufficient by Appellant Keshia Cherie Ashford Dixon Replacement Disk Provided [Y/N]: n [04-10250] Sufficient Brief ddl satisfied. E/Res's Brief ddl updated to 11/1/04 for USA. (trm) |
| 11/1/04 | The attorney Candina S Heath for USA not participating in case. [04-10250] (tdb) |
| 11/1/04 | Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 29 Date of COS: 10/29/04 Hand Delivered [Y/N]: N Disk Provided [Y/N]: |

| DATE | PROCEEDINGS |
|---|---|
| | Y Sufficient [Y/N]: Y. [4987871-1] [04-10250] E/Res's Brief ddl satisfied. Reply Brief due on 11/15/04 for Keshia Cherie Ashford Dixon. (tdb) |
| 11/1/04 | Record on appeal requested from Renee Harris Toliver for Appellee USA, Appellee USA. [04-10250] Miscellaneous due on 11/12/04 for USA. (tdb) |
| 11/1/04 | Record on appeal returned to 5CCA. Volumes: 9 Supplemental Volumes: 1 [04-10250] Miscellaneous ddl satisfied. (trm) |
| 11/17/04 | Unopposed motion filed by Appellant Keshia Cherie Ashford Dixon to file brief in excess of the word count limitation but not to exceed 7,355 words. [5002555-1] Date of COS: 11/15/04 Sufficient [Y/N]: y [04-10250] (rff) |
| 11/17/04 | CLERK Order filed granting appellant's unopposed motion to file reply brief in excess of the word count limitation but not to exceed 7,355 words. [5002555-1] Copies to all counsel. [04-10250] (cvt) |
| 11/17/04 | Reply brief filed by Appellant Keshia Cherie Ashford Dixon. Copies of Brief: 8 # of pages: 32 Word count: 7,355 Date of COS: 11/15/04 Disk Provided [Y/N]: y Sufficient [Y/N]: n NEEDS NEW DISK (PARTS OF THE BRIEF ARE MISSING FROM THE DISK). [5004341-1] [04-10250] Reply Brief ddl satisfied. Sufficient Brief due on 11/29/04 for Keshia Cherie Ashford Dixon. (ddv) |

| DATE | PROCEEDINGS |
|---|---|
| 11/24/04 | Brief made sufficient by Appellant Keshia Cherie Ashford Dixon Replacement Disk Provided [Y/N]: y [04-10250] Sufficient Brief ddl satisfied. (ddv) |
| 12/21/04 | Case tentatively calendared for oral argument Week of: 03/07/05. [04-10250] (gam) |
| 1/21/05 | Case calendared for oral argument. [04-10250] (pft) |
| 3/2/05 | Supplemental authorities (FRAP 28(j)) filed by Appellant Keshia Cherie Ashford Dixon. [5093976-1] [04-10250] (pft) |
| 3/8/05 | Oral argument heard. Case argued by J Craig Jett for Appellant Keshia Cherie Ashford Dixon, Renee Harris Toliver for Appellee USA, Appellee USA [04-10250] (tws) |
| 6/20/05 | Opinion filed. Issd in T form? y Mandate pull date is 7/11/05. [04-10250] (jma) |
| 6/20/05 | Judgment entered and filed. [04-10250] (jma) |
| 7/5/05 | Petition filed by Appellant Keshia Cherie Ashford Dixon for rehearing en banc. # of copies filed: 20 [5216955-1] Mandate pull date canceled. Date of COS: 7/5/05 Sufficient [Y/N] : Y [04-10250] (dg) |
| 7/20/05 | COURT Order filed denying appellant's petition for rehearing en banc [5216955-1] With poll (Y/N)?: N Mandate pull date is 7/27/05. Copies to all counsel. [04-10250] (lcb) |
| 7/28/05 | Mandate issued. Approved BOC Issued (Y/N)?: n [04-10250] Mandate pull date satisfied. (rfp) |

| DATE | PROCEEDINGS |
|---|---|
| 8/1/05 | Record on appeal returned to 5CCA. Volumes: 9 Supplemental Volumes: 2 SEALED: 1 env [04-10250] Case Management ddl satisfied. (dg) |
| 8/1/05 | Record on appeal returned to USDC. Volumes: 9 Supplemental Volumes: 2 SEALED: 1 env. [04-10250] (dg) |
| 10/26/05 | Supreme Court notice that petition for certiorari was filed on 10/17/05 by Appellant Keshia Cherie Ashford Dixon. Supct No.: 05-7053 [04-10250] (cav) |

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Mar. 5, 2003]

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CRIMINAL NO.

---

UNITED STATES OF AMERICA

vs.

KESHIA CHERIE ASHFORD DIXON

---

The Grand Jury charges

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*COUNT 1*

*Acquisition of Gun While Under Indictment*
*(Violation of 18 U.S.C. § 922(n))*

On or about the following dates in January 2003, in the Dallas Division of the Northern District of Texas, *Keshia Cherie Ashford Dixon*, defendant, while under indictment for a crime punishable by imprisonment for a term exceeding one year, did receive the firearms described below,

| DATE | FIREARM | SERIAL NUMBER | DEALER/ SHOW LOCATION |
|---|---|---|---|
| 01/04/03 | Hi-Point, CF, .380 caliber pistol | P773713 | Texas Star Gun Sales Dallas Market Hall |
| 01/04/03 | Hi-Point, CF, .380 caliber pistol | P773715 | Texas Star Gun Sales Dallas Market Hall |
| 01/04/03 | Intratec, Tec-22, .22 caliber pistol | 025815 | Silent Inovations Dallas Market Hall |

| | | | |
|---|---|---|---|
| 01/11/03 | Jennings, 9, 9mm pistol | 1537984 | Graves Guns Big Town in Mesquite |
| 01/11/03 | Masterpiece Arms, MPA10, pistol | AO984 | Graves Guns Big Town in Mesquite |
| 01/11/03 | Masterpiece Arms, MPA10, .45 caliber pistol | AO981 | K K Sales Big Town in Mesquite |
| 01/11/03 | Hi-Point, 995CN, 9mm carbine rifle | B52203 | K K Sales Big Town in Mesquite |

each having previously been shipped or transported in interstate and foreign commerce.

In violation of Title 18, United States Code, Section 922(n).

*COUNTS 2-9*

*False Statement to Purchase Firearm*
*(Violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2))*

On or about the following dates in January 2003, in each count below, in the Dallas Division of the Northern District of Texas, *Keshia Cherie Ashford Dixon*, defendant, in connection with her acquisition and attempted acquisition of the firearms described below from the corresponding licensed dealers,

| COUNT | DATE | FIREARM | SERIAL NUMBER | DEALER/ SHOW LOCATION |
|---|---|---|---|---|
| 2 | 01/04/03 | Hi-Point, CF, .380 caliber pistol | P773713 | Texas Star Gun Sales Dallas Market Hall |

| | | | | |
|---|---|---|---|---|
| 3 | 01/04/03 | Hi-Point, CF, .380 caliber pistol | P773715 | Texas Star Gun Sales Dallas Market Hall |
| 4 | 01/04/03 | Intratec, Tec-22, .22 caliber pistol | 025815 | Silent Inovations Dallas Market Hall |
| 5 | 01/11/03 | Jennings, 9, 9mm pistol | 1537984 | Graves Guns Big Town in Mesquite |
| 6 | 01/11/03 | Masterpiece Arms, MPA 10, pistol | AO984 | Graves Guns Big Town in Mesquite |
| 7 | 01/11/03 | Masterpiece Arms, MPA10, .45 caliber pistol | AO981 | K K Sales Big Town in Mesquite |
| 8 | 01/11/03 | Hi-Point, 995CN, 9mm carbine rifle | B52203 | K K Sales Big Town in Mesquite |
| 9 | 01/11/03 | Hi-Point, 995CN, 9mm carbine rifle | B19559 | Marshal Armaments Big Town in Mesquite |

did knowingly make a false and fictitious written statement to each licensed dealer, which was likely to deceive the licensed dealer as to a fact material to the lawfulness of her acquisition and attempted acquisition of the firearm, in that *Dixon* responded "No" to question 9(b) on form 4473, "Are you under indictment or information in any court for a crime for which the judge could imprison you for more than one year?"

when in fact, as *Dixon* well knew, she was under indictment in the United States District Court for the Northern District of Texas, Dallas Division, in cause number 3:01-CR-385-P.

In violation of Title 18, United States Code, Sections 922(a)(6) and 924(a)(2).

A TRUE BILL

/s/ [illegible]
FOREPERSON

JANE J. BOYLE
United States Attorney

/s/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney
Texas State Bar No. 09347450
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Tel. 214.659.8600
Fax. 214.767.2846

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

---

THE UNITED STATES OF AMERICA

VS.

KESHIA CHERIE ASHFORD DIXON

---

INDICTMENT

18 USC 922(n) AND 18 USC 922(A)(6) and 924(A)(2)
ACQUISITION OF GUN WHILE UNDER INDICTMENT
AND FALSE STATEMENT TO PURCHASE FIREARMS

9 COUNTS

A true bill,
/s/ [illegible]
DALLAS FOREPERSON

Filed in open court this ___ day of ___, A.D. 20__.

Clerk
IN CUSTODY.

/s/ Jorge A Solis
UNITED STATES DISTRICT JUDGE
3:03-MJ-024

J. CRAIG JETT
ATTORNEY AT LAW
THANKSGIVING TOWER
SUITE 2000
1601 ELM STREET
DALLAS, TEXAS 75201-4718

(214) 871-7676

FAX (214) 979-0001
EMAIL jcj@mcmclaw.com

OF COUNSEL TO
MCCOLL & MCCOLLOCH

August 6, 2003

*via facsimile and regular U.S. Mail*

Ms. Candina S. Heath
Assistant United States Attorney
1100 Commerce Street, 3rd Floor
Dallas, TX 75242-1699

Re: Cause No. 3:03-CR-0055-P
*United States vs. Keshia Cherie Dixon*

Dear Ms. Heath:

This letter is in response to Judge Solis' order requiring disclosure of defendant's intent to offer expert testimony and the disclosure of the identity of an expert witness. Please be advised that if I believe the government has proved the allegations in the indictment beyond a reasonable doubt that I plan to call an expert witness to offer testimony on behalf of Keshia Dixon. I disagree that notice under Rule 12.2(b), Fed. R. Crim. Pro., is required because I do not believe that the subject of the expert testimony will be a mental disease or defect or other mental condition of the defendant.

In your motions you assert that the defendant has an obligation under Rule 16(h)(1)(C), Fed. R. Crim. Pro. to give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Rule 702, 703, and 705, Fed. R. Crim. Ev. That obligation is contingent upon one of two matters. The obligation to provide that disclosure is invoked if the defendant has requested disclosure under Rule 16(a)(1)(G). A review of the motions filed on behalf of Ms. Dixon in this case does not reveal a request to the government for discovery under that section. The second way that this duty of disclosure is invoked is if the defendant has given notice under Rule 12.2(b) of the intent to present expert testimony on the defendant's mental condition. Rule 16(b)(1)(C)(ii), Fed. R. Crim. Pro. As I have stated above, I do not intend to call a witness who will testify to a mental disease or defect or other mental condition of the defendant.

As the Court requires that both sides provide a list of witnesses, who are to be designated as fact or expert, I have submitted a list of witnesses which lists Toby Myers as an expert witness. Dr. Myers is an expert on domestic violence and how people react to and how it affects people, particularly women. If called as a witness, Dr. Myers will testify that Keshia Dixon has experienced violence, abuse and control at the hand of intimate partners for years up to shortly before and at the time of the purchase of the firearms. I believe Dr. Myers will testify as to how Ms. Dixon's life circumstances, particularly the domestic violence, affected her judgment and her behavior. Dr. Myers' testimony will support defenses of duress and/or necessity. Dr. Myers' testimony will be based upon her interviews with the defendant and the defendant's family, court documents from Ms. Dixon's prior case, testimony from the detention hearing and information about the prior criminal history of the perpetrators of the violence against her. Dr. Myers' opinion will also be based upon her

vast experience in the field, which is set out in her *Curriculum Vitae* which accompanies this letter.

Very truly yours,

/s/ J. Craig Jett
J. CRAIG JETT

JCJ/sp
Enclosures
cc: Honorable Jorge Solis

## *CURRICULUM VITAE*

Toby Myers
713.668.6942
email: tobymyers@yahoo.com
website: http://home.houstonrr.com/tobymyers
(in construction)

*EDUCATION*:

DEGREES

University of Houston. EdD , 1976
University of Texas at Austin, MEd, 1965
University of Texas at Austin, BS, 1959

GRADUATE COURSES

Baylor College of Medicine, Houston, 1972
West Texas State University, Canyon, 1964
Southern Methodist University, Dallas, 1959

OTHER

Instensive German Course for Foreigners-Universitaet Gesamthochschule, Siegen, Germany, 1982

*FELLOWSHIP*:

Texas Research Institute of Mental Sciences Predoctoral Fellowship

*DISSERTATION*:

The Effect of Creative Dramatics on Language Development and Treatment Progress of Children in a Psychotherapeutic Nursery

*WORK*:

PRIVATE PRACTICE
Houston, TX; Counseling and Psychotherapy Consultation. Expert Witness testimony and related as-

sistance in Domestic Violence cases for prosecution and defense, in related family, criminal, immigration, personal injury, employment matters in courts, before licensing boards, and other official hearings, 1980-Current

AID TO VICTIMS OF DOMESTIC ABUSE
Houston, TX; Founder and Director of Battering Intervention Service 1984-1999; Part-time staff, 1999-2002

HOUSTON INTERNATIONAL HOSPITAL
Houston, TX; Director of Staff Development and Continuing Education, 1983-1985

TEXAS COUNCIL ON FAMILY VIOLENCE
Austin, TX; Director of International Development Project, 1981-1982

TEXAS WOMAN'S UNIVERSITY
Houston, TX; Associate Professor, Child Development and Family Living, 1979-1982

TEXAS RESEARCH INSTITUTE OF MENTAL SCIENCES
Houston, TX; 1974-1979. Research Specialist, 1978-1979: Research Associate, 1975-1978: Predoctoral Fellow, 1974-1975

TEXAS REHABILITATION COMMISSION
Houston, TX; Vocational Rehabilitation Counselor, 1968-1974

PUBLIC SCHOOL TEACHING
Dallas, TX ISD, 1959-1960: Special District for the Education and Training of Handicapped children of St. Louis County, MO, 1960-1961: Normandy, MO ISD, 1961-62: Amarillo, TX ISD, 1962-1964: Uvalde, TX ISD, 1964-1965

*ADJUNCT ACADEMIC APPOINTMENTS*:

UNIVERSITY OF TEXAS SCHOOL OF PUBLIC HEALTH
Houston, TX; Behavior Sciences, 1979-1998

UNIVERSITY OF HOUSTON CLEAR LAKE
Houston, TX; Human Science, Early Childhood, 1983-1989

*CERTIFICATION*:

LICENSED MASTER'S SOCIAL WORKER-ADVANCED CLINICAL PRACTITIONER.
S13291—Texas State Board of Social Work Examiners

LICENSED PROFESSIONAL COUNSELOR, 08309—Texas State Board of Examiners of Professional Counselors

LICENSED PSYCHOLOGICAL ASSOCIATE.
4-0884—Texas State Board of Examiners of Psychologists

PSYCHOLOGIST AND EDUCATIONAL SPECIALIST, 113. 125. Texas Department of Mental Health and Mental Retardation-Diagnostic and Evaluation Team

CERTIFIED GROUP THERAPIST, 24887—American Group Psychotherapy Association-National Registry of Certified Group Therapists

CERTIFIED REHABILITATION COUNSELOR, 03016—National Rehabilitation Association-retired

TEACHER and EDUCATIONAL DIAGNOSTICIAN, Texas Education Association

*PUBLICATIONS*:

Myers, T. Review of Silence is Deadly: Judaism Confronts Wifebeating by Naomi Graetz: *Violence Against Women*, 6, 3, 2000.

Myers, T. Re-offending in battering Intervention Programs. *Violence Update* 4, 3, 1993.

Myers, T. An interview with Carol Nadelson, first woman president of the American Psychiatric Association. *The Journal: Houston International Hospital*, 3, 2, 1985.

Eddy, M.J. & Myers, T. Helping Men Who Batter: *A Survey of Programs in the U.S.*, Texas Department of Human Services. 1984.

Myers, T. & Gilbert, S. Wifebeaters' group through a woman's center: why and how. *Victimology: An International Journal*. 8, 1-2, 1983.

Myers, T. & Wright, D. Raised in violence. Texas *Child Care Quarterly*, 4, 1980.

Coleman, K.H., Holley, M. & Myers, T. Sex-role stereotypes: they contribute to conjugal violence. *Handbook of the Proceedings of the United States Commission of Civil Rights Hearings on Domestic Violence*, Washington, D.C., 1978.

Faires (former name), T. A group experience to foster mothering skills in drug using mothers. *Drug Forum*, 5, 2, 1977: in Olson, D. (ed.) *Inventory of Marriage and Family Literature*, V, St. Paul; University of Minnesota Press, 1977-1978.

Faires (former name), T. Vocational rehabilitation of the drug abuser in the southwest, *Vocational Rehabilitation of the Drug Abuser*, Department of Health, Education and Welfare, Social and Rehabilitation Services, Washington, D.C., 1973.

*APPOINTMENTS*:

Research Advisory Committee of the Greater Houston Women's Foundation, 1997

Jewish Advisory Board of The Center for the Prevention of Sexual and Domestic Violence, Seattle, WA; 1992-Current

Surgeon General's Workshop on Violence and Public Health by C. Everett Koop, M.D., Surgeon General of the U.S. 1985

Interpersonal Violence Committee, University of Texas Health Science Center at Houston by Roger Bulger, President, 1985-1990

Family Violence Advisory Committee to the Texas Department of Human Services by Chair of TDHS Board, 1984-1988; Chair of Committee, 1984-1987

Family Self Support Advisory Committee to the Texas Department of Human Services by Commissioner, TDHS, 1982

*BOARDS*:

NATIONAL TRAINING CENTER ON DOMESTIC AND SEXUAL VIOLENCE, 1998-Current; Member of Founding Board, Secretary

HARRIS COUNTY DOMESTIC VIOLENCE COORDINATING COUNCIL Board; 1998-Current; Death Review Team Co-Chair 2001-Current

TEXAS COUNCIL ON FAMILY VIOLENCE, 1978-1998; Member of Founding Board; Chair, 1978-1981

UNIVERSITY OF HOUSTON, Friends of Women's Studies Board, 1993-1999

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, 1982-1985

AID TO VICTIMS OF DOMESTIC ABUSE, Founding Board, 1980-1990; Treasurer, 1987-1990

COALITION AGAINST DOMESTIC ABUSE, Secretary, 1987-1988: Chair, 1988-1989

DOMESTIC VIOLENCE INSTITUTE, Denver, CO: Advisory Board, 1990

UNIVERSITY OF HOUSTON-UNIVERSITY PARK, WOMEN'S STUDIES, Advisory Board, 1991-1998

HOUSTON GROUP PSYCHOTHERAPY SOCIETY, 1989-1992; 2000-Current

HOUSTON METROPOLITAN MINISTRIES, Overseers Board, 1984-1986

HOUSTON AREA WOMEN'S CENTER, Founding & Executive Board, 1977-1978

HEBREW ACADEMY, Board & Executive Board, 1977-1980

HOUSTON AREA FEMINIST FEDERAL CREDIT UNION, Credit Committee, 1975-1978

*EDITORIAL BOARD*:

*Violence Against Women: An International and Interdisciplinary Journal.* Sage Periodicals Press: Thousand Oaks, CA 1996-2000

*Journal of Religion and Abuse: Advocacy, Pastoral Care and Prevention.* The Haworth Pastoral Press: Binghamton, NY 2001-Current

*AWARDS*:

Woman of Distinction 2001, The Bridge. Pasadena, TX 2001

Woman of Influence Recognition; Women's Group of the Unitarian Church, 1993

Lifetime Board Seat: Texas Council on Family Violence, 1991

Statewide Leadership Award: Texas Council on Family Violence named in honor of Toby Myers. 1989

Spotlight Award: National Council on Crime Prevention, 1989

Special Commendation; Texas Department of Human Services Board for work in Battered Women's Movement, 1988

Hannah G. Solomon Award: National Council of Jewish Women as outstanding woman contributor to positive change, 1986

Member of the Year: Texas Council on Family Violence, 1982

*HIGHLIGHTS*:

INVITED GOVERNMENTAL TESTIMONY

TX Senate Interim Committee on Domestic Violence, Houston, TX 1994; TX Supreme Court Hearings on Gender Bias, Houston, TX, 1992; TX Punishment Standards Commission, Houston, TX 1992; US Attorney General's Task Force on Family Violence, San Antonio, TX, 1984; TX House and Senate on Domestic Violence Legislation, 1979, 1981, 1988; US House of Representatives, Committee on Science and Technology Hearings on Domestic Violence, Washington, D.C., 1978

GRANTS AWARDED

TX Department of Criminal Justice-Batterer's Intervention and Prevention Project $73,500 co-

authored with R. Gerson, 1990-2000. Ark-Tex Council of Governments, $5400 co-authored with J. Basen, 1987; Texas Department of Human Services, $10,000 co-authored with M. Eddy, 1983; Texas Department of Human Services, co-authored with S. Eggert & M. Morse, $42,500

SPECIAL PROJECTS

MS FOUNDATION GALA, Organized segment, 1984. WOMEN'S SUMMIT FOR HOUSTON in both 1990 AND 1992, Crimes Against and Fear of Women in Houston sponsored by Houston Police Department; Steering Committee and Presenter. TEXAS SENATE JURISPRUDENCE COMMITTEE to evaluate condition of battered women in prison assistance in organizing carrying out hearings, 1989. STANDARDS AND OPERATIONAL GUIDELINES DEVELOPMENT for Texas Battering Intervention and Prevention Programs, 1993-1994.

TRAINING

Houston Police Department, 1982-1990. Harris County Community Supervision and Corrections Department, 1984. Ark-Tex Council of Governments, 1987. Harris County Sheriff's Department, 1990, TX Division of Pardons and Paroles, 1991.

CONSULTATION

U. S. Department of Defense Task Force on Family Violence, Offender Accountability, 2002.

*MEMBERSHIPS*:

American Group Psychotherapy Association Clinical Member

Houston Group Psychotherapy Association

American Counseling Association

Texas Council on Family Violence

National Coalition Against Domestic Violence

National Council of Jewish Women

Harris County Domestic Violence Coordinating Council

*PRESENTATIONS AND PAPERS*:

Drugs, Alcohol and Vocational Rehabilitaiton. Texas Rehabilitaiton Association Houston, TX; July, 1973.

These Too Are Our Children: Historical Overview of Children With Handicaps. Head Start Regional Meeting. Houston, TX; November, 1976.

Creative Dramatics. Harris County Licensed Child Care Annual Workshop. Houston, TX; November, 1976; March, 1977.

Creative Dramatics in a Therapeutic Nursery. American Association of Psychiatric Services for Children. San Francisco, CA; November, 1977.

Pow! Right in the Kisser. Wifebeating. American Psychiatric Association. Toronto, Canada; May, 1977.

Wham! Bam! No, Thank You. Man; Battered Women and their Children. American Association of Psychiatric Services for Children. Washington, DC; 1977.

Battered Women. Texas Research Institute of Mental Sciences and Houston Area Women's Center Workshop; Houston, TX; January, 1978.

Domestic Violence. Woman's Week at the University of Houston Clear Lake. Houston, TX; January, 1978.

Genesis of a Child Therapy Training Program. American Association of Psychiatric Services for Children. Atlanta, GA; November, 1978.

Victim: The Battered Woman; B'nai Brith Women Southwest Conference, Houston, TX; May, 1978.

Domestic Violence. Women's Week at the University of Houston Clear Lake. Houston, TX; January, 1978.

Battered Women. Women's Studies Association. South Central Regional Meeting, Denton, TX; May, 1978; National Meeting. Lawrence, KS; June, 1979.

Child Therapists: From Whence They Come. Texas Association for the Education of Young Children. Dallas, TX; October, 1979.

Experiential Group as Training for Child Therapists. American Association of Psychiatric Services for Children. Chicago, IL; November, 1979.

Children of the Shelter. Technical Assistance Center on Family Violence Conference. Houston. TX; January, 1980.

New Resources for Abused People. Women's Week at the University of Houston Clear Lake. Houston, TX; March, 1980.

Domestic Violence: The Unspoken Crime. National Association of Community Health Centers. Houston. TX; September, 1980.

Victims of Family Violence: Defining the Network. Texas Children's Hospital Conference on Abuse. Houston, TX; September, 1980.

Current Issues for Battered Women. Womanfair-South Central Women's Studies Association. Arlington, TX; October, 1980.

Creative Dramatics in a Therapeutic Nursery: Research Results, American Association of Psychiatric Services for Children. New Orleans, LA; November, 1980.

Raised in Violence. American Association of Psychiatric Services for Children. New Orleans, LA; November, 1980.

Women and Judaic Tradition. First Annual Women's History Conference of the American Association of University Women. Houston, TX; March, 1981.

The Battered Woman. Houston Women Take Back the Night. Houston, TX; April, 1981.

Domestic Violence: Treatment for Batterers. International Institute for Higher Studies in Criminal Sciences' Seminar on Victimology. Syracuse, Italy; January, 1982.

Domestic Violence: A Seminar. Max-Planck Institute for Foreign and International Criminal Law. Freiberg, Germany; April, 1982.

Family Violence Texas Women's Political Caucus Annual Conference. Austin, TX; December 1982.

Battered Women in Group. Houston Group Psychotherapy Society Annual Institute, Houston, TX; April, 1983.

History of the Battered Women's Movement. Texas Council on Family Violence. 4th Annual Conference. Austin, TX. October, 1983.

Helping Those Who Batter. Second National Conference for Family Violence Researchers. Durham, N.H.; August, 1984.

Going to Court with Battered Women. Texas Council on Family Violence 5th Annual Conference. Austin, TX: October, 1984.

Women with Severe Psychiatric Problems in Shelter. Texas Council on Family Violence 5th Annual Conference. Dallas, TX; November, 1985.

Men Who Batter: Current Thoughts, Treatment, and Vicissitudes. Houston Group Psychotherapy Society Institute, Houston, TX: March, 1986.

But Jewish Women Don't Get Battered.

Mothers and Daughters: End of the Decade. Third National Conference of the National Coalition Against Domestic Violence. St. Louis, MO: July, 1986.

Dynamics of Family Violence. First Annual Institute on Family Violence of the Criminal Justice Center at Sam Houston State University. Huntsville, TX; August, 1986.

Family Violence. U.S. Probation and Parole South Central Conference. Houston, TX: September, 1986.

Treatment of Men Who Batter. Institute at Texas Council on Family Violence 7th Annual Conference, South Padre Island, TX; October, 1986.

Some Lovers Break More Than Hearts. Women and the Law Conference of the Texas Bar Association, Austin, TX: February, 1987.

Family Violence: Treatment of Men Who Batter. Houston Group Psychotherapy Society Annual Institute. Houston, TX; March, 1987.

History of the Battered Women's Movement. Occupational Health Nurse Conference. Houston, TX; March, 1987.

The Battering Cycle: Dynamics of Family Violence. Methodist Hospital, March of Dimes, and Greater Houston Area Council on Family Violence. Houston, TX; April 1987.

Conflicts Between Confidentiality and Advocacy. First National Conference on Treatment of Batterers. Baltimore, MD: April, 1967.

Issues Surrounding Abuser Services. Illinois Coalition Against Domestic Violence Annual Conference. Springfield, IL; June, 1987.

Battered Women and the Men Who Batter Them, American Association of University Women Annual Conference. Houston, TX; June, 1987.

This is Not a Job: It's a Crusade. Texas Council on Family Violence 8th Annual Conference. Austin, TX; October, 1987.

Wifebeating. Mental Health Association Workshop. Beaumont, TX; March, 1988.

Some Lovers Break More Than Hearts. Houston Group Psychotherapy Society Annual Institute. Houston, TX: March, 1988.

Family Violence. Texas Woman's University Preceptorship Training for Nurses. Austin, TX; April, 1988.

Battered Women. University of Texas Medical Branch Continuing Education Seminar for Nurses. Brownsville, TX; April, 1988.

Working with Battered Women in Migrant Health Networks. National Association of Community Health Centers. Hollywood, FL; May, 1988.

Battered Jewish Women; Can We Deliver What They Need? Fourth National Conference of the National Coalition Against Domestic Violence. Seattle, WA; July, 1988.

New Research in Family Violence. Second Family Violence Conference of the Criminal Justice Center at Sam Houston State University, Walker County Domestic Violence Council, and the Texas Council on Family Violence. Huntsville, TX; September, 1988.

Bringing Light to a Dark Subject: Violence in the Home. Bexar County Coalition on Domestic Violence. San Antonio, TX: October, 1988.

Some Lovers Break More Than Hearts: Keynote Address. First Annual Conference on Family Violence of El Paso Community College, El Paso, TX; November, 1988.

The Dynamics of Family Violence, Hispanic Women's Leadership Conference. Houston, TX; February, 1989.

Some Lovers Break More Than Hearts. A Feminist Approach to the Treatment of Wifebeaters. South Central Women's Studies Association. Houston, TX; April, 1989.

Intervention Strategies forVictims of Violence. Crisis Intervention Annual Conference. Houston, TX; April, 1989.

Break the Pattern Not the Partner. Houston Group Psychotherapy Institute. Houston, TX; April 1989.

Cooperation and Competition Between Programs Treating Men Who Batter. Second National Conference on Treatment of Men Who Batter. Baltimore, MD; April, 1989.

Battered Women's Defense: Expert Testimony. Training Conference Sponsored by Texas Council on Family Violence, Criminal Justice Division of the Governor's Office, and the Texas Department of Human Services. Austin, TX; May, 1989.

Domestic Violence Workshop. Lower Rio Grande Valley Developmental Center. McAllen, TX; June, 1989.

It Doesn't Happen in a Jewish Family . . . or Does It? American Jewish Committee's Women's Issues Series, Houston, TX; June, 1989.

Controversial Issues in the Treatment of Men Who Batter. Texas Council on Family Violence 9th Annual Conference. Austin, TX; October, 1989.

From Concept to Statute: Legislating for Battered Women. National Conference on Battered Women And Justice. St. Louis, MO; November, 1989.

She Asked For It; Techniques a Men Who Batter. Houston Group Psychotherapy Society. Houston, TX; April, 1990.

Where Should We Be Going? First Battered Women's Advocacy Training Conference. Battered Women's Advocacy Project and San Antonio College, San Antonio, TX; May, 1990.

The Fist and The Bottle: Partners in Crime. Spectrum. Houston, TX; June, 1990.

Avoiding Rape and Domestic Violence. Houston Women in the 90's. Women's Education and Leadership Foundation, Houston, TX; June, 1990.

Domestic Violence. Texas District and County Attorney's Association. Padre Island, TX; September, 1990.

The Battered Women's Movement. Texas History Association. Austin, TX: October, 1990.

Ethics in the Battered Women's Movement. Texas Council on Family Violence 10th Annual Conference. Austin, TX; October, 1990.

Shalom Bayit; Domestic Violence in Jewish Families.

The Ultimate Mitzvah: Chevra Kadisha, Texas Jewish Feminist Conference. Houston, TX: October, 1990.

Battered Women. Women at Risk Forum. City of Houston Health and Human Services Department. Houston, TX; March, 1991.

Wife Beating Can Be Beaten. Houston Group Psychotherapy Society. Houston, TX; April, 1991.

Ethical Considerations in the Battered Women's Movement. Texas Council on Family Violence 11th Annual Conference. Austin, TX; October, 1991.

Sexual Assault and Domestic Violence. Houston Group Psychotherapy Society Special Training. Houston, TX; January, 1992.

Working on Violence Against Women Through Social Organization. Houston Police Department et al, Summit II. Houston, TX; September, 1992.

The Definitive Course on Battered Spouse Syndrome. Texas District and County Attorney's Association. South Padre Island, TX; September, 1992.

Ethical Considerations in Battering Intervention and Prevention Programs. Texas Council on Family Violence 12th Annual Conference. Austin, TX; October, 1992.

Battered Women and Sexual Assault. Houston Group Psychotherapy Society Special Training. Houston, TX: January, 1993.

The Politics of Women's Health Care. Women's Health Challenge: Take the Initiative. Women's Studies Program of the University of Houston. Houston, TX: April, 1993.

Wife-battering and Child Sexual Assault in the Jewish Community. Center for the Prevention of Sexual and Domestic Violence Bi-National Conference. Chicago, IL; May, 1993.

Domestic Violence. Texas Association of Municipal Court Clerks. Houston, TX; May, 1993.

Men Who Batter Assessment Management and Prevention: Domestic Violence and the Health Care Provider. Harris County Hospital District, Harris County Medical Society and Houston Area Women's Center. Houston, TX; October, 1993.

Two Generations in the Texas Battered Women's Movement, Texas Council on Family Violence

13th Annual Conference. Austin, TX; October, 1993.

Shattered Shalom. Domestic Violence in Jewish Families. Jewish Family and Children's Service and Jimmy Carter Presidential Center. Atlanta, GA; January, 1994.

Ethics in Battering Intervention Programs: Accountability to Battered Women. Texas Council on Family Violence Forum. Austin, TX; March, 1994.

Multi-disciplinary Approach to Domestic Violence. Training Shelter Workers as Expert Witnesses. Arizonans Together For Victims For Justice. Phoenix, AZ; April, 1994.

What Does Race Have to Do With It? National Coalition Against Domestic Violence-Sixth International Conference. St Paul, MN; August, 1994.

Praises and Lamentations: Pathways to Healing through Storytelling.

Family Violence on Trial: New Applications of Expert Consultation. Texas Council on Family Violence 14th Annual Conference. Austin, TX; October, 1994.

Social Service for Social Change through a Program for Abusive Men. Texas Psychological Association Annual Conference. Houston, TX; November, 1994.

Special Topics in Group Psychotherapy: Group Treatment of Sexual and Domestic Abuse. Houston Group Psychotherapy Association. Houston, TX; January, 1995.

Working with Men Who Batter, Houston Bar Association, Houston, TX; April, 1995.

The PIVOT Project for Men Who Batter. University of Texas Medical Branch; Department of Psychiatry Grand Rounds. Galveston, TX; September, 1995,

BIPP Basics: Theory and Practice—Part I.

Are Battered Women Really Helpless?

Jewish Perspectives on Domestic Violence. Texas Council on Family Violence 15th Annual Conference. Dallas, TX; October, 1995.

Special Topics in Group Psychotherapy: Working with Perpetrators of Domestic Violence. Houston Group Psychotherapy Society. Houston, TX; November, 1995.

Effects of Race Ethnicity and Gender on Identification of Victims and Offenders. Harris County District and County Courts Judicial Conference on Family Violence, Sexual Assault and Child Abuse. Houston Bar Association. Houston, TX; June, 1996.

Spousal Privilege. Texas District and County Attorney's Association Key Personnel Seminar. Austin, TX; November, 1996.

Jewish Men Make Perfect Husbands—Or Do They? Jewish Women International et al National Conference on Abuse in the Jewish Home, Waltham, MA; April, 1997.

Representing the Battered Women: Effective Strategies for Civil Cases and Criminal Defense. Texas Young Lawyers' Association's Committee on the Prevention of Domestic Violence, Texas Council on Family Violence, Texas Lawyers

Care, State Bar of Texas Professional Development Program, Houston Volunteer Lawyers. Houston, TX; April, 1997.

A Program Staffs Response to Participation in Batterer Program Evaluation. 5th International Family Violence Research Conference. Durham, NH; July, 1997.

Pushy? Smart? Rich? Horns: Anti-Anti-Semitism Work for the Movement. Texas Council on Family Violence 16th Annual Statewide Family Violence Conference. Houston, TX; October, 1997.

Batterer's Treatment and Certification. National Network to End Domestic Violence Annual Meeting and Leadership Institute. Washington, DC; October, 1997.

Abuse: A Jewish Family Issue. Union of American Hebrew Congregations Biennial Conference. Dallas, TX; October 1997.

Current Knowledge of Batterers and Promising Intervention Programs, Domestic Violence Institute for Law Enforcement Trainers. Tucker, Buel and Associates. Austin, TX; December, 1997.

Effective Battering Intervention Programs. Coordinated Community Response to Domestic Violence. National Training Center on Domestic and Sexual Violence, Austin, TX; August, 1998.

So You're Going to Testify in a Family Violence Case. Texas Council on Family Violence 17th Annual Statewide Family Violence Conference, Corpus Christi, TX; October, 1998.

Domestic Abuse Happens in Jewish Homes. Denver Jewish Coalition Against Abuse. Denver CO; January, 1999.

Domestic Violence Hits Home: Groups for Men Working Toward Safety for Women. American Group Psychotherapy Association Annual Conference. Houston, TX; February, 1999.

Roles of Males in Finding Domestic Violence Primary and Secondary Prevention Strategies. The Next Millennium Conference: Ending Domestic Violence. US Department of HHS. Chicago, IL; August, 1999.

What is an Expert Witness. How and Why to Use Expert Witnesses, Surviving Cross Examination. Understanding the Process to Qualify Experts. Be Prepared; Issues and Strategies to be an Expert Witness in Domestic Violence Cases. The South Dakota Department of Social Services and the National Training Center on Domestic and Sexual Violence. Pierre, SD; December, 1999.

What Attorneys Who Represent Victims of Domestic Violence Need to Know. Qualifying, Examining and Cross-Examining Experts: Discussion and Demonstration. Representing Battered Spouses in Custody and Visitation Matters, Texas Bar Association and Texas Lawyers Care. Austin, TX; February, 2000.

Advocates as Expert Witnesses in Domestic Violence and Sexual Assault. The Changing Role of Law Enforcement in Ending Violence Against Women. National Training Center on Domestic and Sexual Violence. Austin, TX; November, 2000.

The Use of Expert Witness in Domestic Violence Cases. Women's Advocacy Project Conference. Austin, TX; February, 2001.

Why? Who? When? Where? How? Expert Witnesses for Domestic Violence and Sexual Assault Cases. National Training Center on Sexual and Domestic Violence Conference. Austin, TX; June, 2001.

Miles to Go Before We Sleep, Keynote Address at 5th Annual Laredo Webb County Domestic Coalition Conference. Laredo, TX; October, 2001.

Beyond Survival: Surviving After Abuse. Shalom Bayit Conference of Jewish Family and Children's Service. Louisville, KY; October, 2001.

Do Not Stand Idly By. Shalom Beyit Conference of Jewish Family and Children's Service. Atlanta, GA; February, 2002.

Domestic Violence Hits Home. Houston Group Psychotherapy Annual Institute. Houston, TX; April, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Aug. 11, 2003]

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3-03CR-0055-P

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UNITED STATES OF AMERICA

vs.

KESHIA CHERIE DIXON

---

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

TO THE HONORABLE JORGE A. SOLIS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:

COMES NOW Keshia Cherie Dixon, the Defendant in the above styled and numbered cause and requests that the Court submit the following instructions to the jury in this case.

Respectfully Submitted,

/s/ J. Craig Jett
J. CRAIG JETT
1601 Elm Street
Thanksgiving Tower
Suite 2000
Dallas, Texas 75201
Phone: 214-871-7676
Fax: 214-979-0001

Attorney for Defendant
Keshia Cherie Dixon

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant's Requested Jury Instructions was hand delivered to Candina Heath, Assistant United States Attorney, 1100 Commerce Street, Dallas, Texas 75242-1699, on the 11th day of August, 2003.

/s/ J. Craig Jett
J. CRAIG JETT

## REQUESTED JURY INSTRUCTION NO. 1

## DURESS—ELEMENTS

The Defendant has offered evidence to show that at the time of the purchase of the firearms she was acting under duress or coercion. If a person commits an offense while under duress or coercion that person is not guilty.

Under our law, in order to be considered under duress or coercion the Defendant must present evidence of the following:

> *One*. That at the time of the conduct in question the Defendant was under unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury to herself or to another;
>
> *Two*. The Defendant had not recklessly or negligently placed herself in a situation where it was probable that she would be forced to choose the particular criminal conduct with which she is charged;
>
> *Three*. That the Defendant had no reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
>
> *Four*. That a direct causal relationship could be reasonably anticipated between the conduct alleged to be criminal and avoidance of the threatened harm.[1]

In determining whether the elements of duress are met you may take into account the situation in which the Defendant was allegedly subjected to duress. In addition to the immediate circumstances of the alleged criminal conduct, this would include evidence concerning the Defendant's past

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[1] *United States vs. Willis*, 38 F.2d 170, 175, (5th Cir. 1994); *United States vs. Harper*, 802 F.2d 115, 117 (5th Cir. 1986)].

history with the person or persons making the unlawful threat. In order to show that the Defendant's alleged illegal conduct was the result of duress or coercion, it must be shown that the Defendant's fear is well-grounded. A fear that may appear irrational when viewed only in the light of the immediate circumstances may be well-grounded if the Defendant's experience with the person applying the threat, or other prior life circumstances of the Defendant, are such that she can reasonably anticipate being harmed for her failure to comply. It is not necessary for there to be proof that the Defendant did not recklessly or negligently place herself in a relationship with the person or persons making the threat, it is necessary that there be proof that the Defendant did not recklessly or negligently place herself in a situation in which it was probable she would be forced to unlawfully purchase the firearms alleged in the indictment. In determining whether or not you believe the Defendant had a reasonable legal alternative to violating the law, you must consider the circumstances from the perspective of the accused, taking into consideration her life circumstances and her past history with the person alleged to have made the unlawful threat. Finally, you must find that the Defendant reasonably believed that the alleged criminal conduct would avoid the threatened harm.[2]

_____ GRANTED

_____ DENIED

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[2] [*United States vs. Willis*, 38 F.3d 170, 177 n.8 (5th Cir. 1994)].

## REQUESTED JURY LNSTRUCTION NO. 2

## DURESS: BURDEN OF PRODUCTION AND BURDEN OF PROOF

You are instructed that the Defendant has the burden of producing evidence to support each of the foregoing elements. If the Defendant produces evidence to support each of the foregoing elements, then the government must prove beyond a reasonable doubt the absence of duress or coercion. Therefore, if the Defendant produces some evidence that supports each of the four elements of the defense of duress or coercion, the government must prove the following beyond a reasonable doubt:

> *One*. That the Defendant was *not* under an unlawful and present, imminent and impending threat of such a nature that would induce a well-grounded apprehension of death or serious bodily injury to the Defendant or another; and
>
> *Two*. That the Defendant had recklessly or negligently placed herself in a situation where it was probable that she would be forced to illegally purchase firearms; and
>
> *Three*. That the Defendant, from her perspective and position, did have a reasonable legal alternative to violating the law, that is, the Defendant had a reasonable chance both to refuse to purchase the firearms and to avoid the threatened harm; and
>
> *Four*. That there was *not* a direct causal relationship between the criminal action taken and the avoidance of the threatened harm.

The government must prove each of the foregoing elements beyond a reasonable doubt. If the government fails to prove one of the foregoing elements beyond a reasonable doubt,

then you must acquit the Defendant and find that she is not guilty.

_____ GRANTED

_____ DENIED

[*Falcon vs. State*, 766 F.2d 1469, 1477 (10th Cir. 1985) citing *United States vs. Bailey*, 444 U.S. 394, 412-13 (1980); *Unite.' States vs. Campbell*, 609 F.2d 922, 924-25 (8th Cir. 1979), *cert. den'd* 445 U.S. 918 (1980); *Pattern Jury Instructions*, U.S. 11th Cir. District Judges Association (1985 Ed.); *United States vs. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982), *cert. den'd* 459 U.S. 850].

## REQUESTED JURY INSTRUCTION NO. 3

## BURDEN OF PROOF—REASONABLE DOUBT

The indictment of formal charges against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

Defendant has pled "not guilty" to each of the charges in the indictment. These pleas put in issue each of the elements of the offenses, as described in these instructions, and the government has the burden of establishing each of these elements by proof beyond a reasonable doubt.

I have said that the government must prove each defendant guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt. The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after careful and impartial consideration of all of the evidence. A reasonable doubt is not a caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. Reasonable doubt is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a rea-

sonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if you, after careful and impartial consideration of all the evidence in the case, have a reasonable doubt that a defendant is guilty of the charge, you must acquit. If you view the evidence in the case a [sic] reasonably permitting either of two conclusions—one of innocence, the other of guilt—you should, of course, adopt the conclusion of innocence.[3]

_____ GRANTED

_____ DENIED

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[3] *See*, Pattern Jury Instruction 1.06, United States Fifth Circuit (West 1990); Vol. 1, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 12.10 (4th ed. 1992); *United States v. Curry, et al.*, Criminal No. CR-3-79-111 (Higginbotham, J.).

## REQUESTED JURY INSTRUCTION NO. 4

## EVIDENCE

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received in evidence, stipulations, and judicially noticed facts.

Exhibits which have been marked for identification but not received into evidence may not be considered by you as evidence. Only those exhibits received into evidence may be considered as evidence.

In judging the evidence, you must remember that the evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I directed you to disregard or that I directed stricken from the record. Do not consider such answers. In addition, you must ignore any questions or suggestions raised by questions that were not answered because I sustained an objection to the question.

You are also to consider any stipulations between the parties as evidence. A stipulation is an agreement between the parties that a certain fact is true. You are to regard such agreed facts as true.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts of what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your verdict should be.

Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded.[4]

_____ GRANTED

_____ DENIED

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[4] L. Sand, T. Siffert, W. Loughlin & S. Weiss, *Modern Federal Jury Instructions*, ¶ 2.01, at No. 2-3, 15.02, at No. 5-4 (1993) (adapted). [Model Instructions from this source are hereinafter cited as "Sand, ¶ ___, at No. ___."]

## REQUESTED JURY INSTRUCTION NO. 5

## NUMBER OF WITNESSES AND UNCONTRADICTED TESTIMONY

You should keep in mind throughout your deliberations that the burden of proof is always on the government, and the defendant is not required to call any witnesses or offer any evidence, since she is presumed to be innocent. The mere fact that one side called more witnesses and introduced more evidence than the other does not mean that you should find the facts in favor of that side.

_____ GRANTED

_____ DENIED

REQUESTED JURY INSTRUCTION NO. 6

CREDIBILITY OF ACCUSED AS WITNESS

A defendant who wishes to testify is a competent witness; and a defendant's testimony is to be judged in the same way as that of any other witness. However, always keep in mind that a defendant never has an obligation to testify.[5]

_____ GRANTED

_____ DENIED

[5] *See* Vol. 1, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 15.12 (4th ed. 1992) (adapted).

## REQUESTED JURY INSTRUCTION NO. 7

## LAW ENFORCEMENT WITNESS

Because a particular witness may be a law enforcement officer such as an investigator, a government agent, or for that matter an employee of any other government agency, that does not mean that his or her testimony is deserving of any special consideration or any greater weight by reason of that fact.

It is quite legitimate for counsel to attack or question the credibility of an agent or other government employee on the ground that his or her testimony may be colored by personal or professional interest in the outcome of the case.[6]

_____ GRANTED

_____ DENTED

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[6] *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967); *United States v. Ronald Green*, No. 3:93-CR-204-D (N.D. Tx. Aug. 10, 1993) (court's charge at p. 8).

## REQUESTED JURY INSTRUCTION NO. 8

## "KNOWINGLY"—TO ACT

You will be asked to consider certain legal terms in your determination of the facts of this case, so at the outset, I will give you some definitions and explanations of legal propositions that you will be considering in your deliberations.

When words are used in this charge in a sense which varies from the meaning commonly understood and you are given a legal definition, you are bound to accept the definition in these instructions in place of any other meaning.

The word "knowingly", as that term is used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident, or other innocent reason.[7]

_____ GRANTED

_____ DENIED

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[7] Pattern Jury Instructions 1.35, United States Fifth Circuit (West 1990) (adapted).

## REQUESTED JURY INSTRUCTION NO. 9

## IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

You have heard evidence that a witness made a statement on an earlier occasion which counsel argues is inconsistent with the witness' trial testimony. Evidence of the prior inconsistent statement was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight to be given to the inconsistent statement in determining whether to believe all or part of the witness' testimony.[8]

_____ GRANTED

_____ DENIED

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[8] L. Sand, T. Siffert, W. Loughlin & S. Weiss, *Modern Federal Jury Instructions*, ¶ 7.01 at 7-73 (1993) (adapted). *See also United States v. Rogers*, 549 F.2d 490, 495-96 (8th Cir. 1976).

REQUESTED JURY INSTRUCTION NO. 10

CAUTION—CONSIDER ONLY CRIMES CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that each individual defendant is guilty of the crimes charged. Each defendant is not on trial for any act, conduct, or offense not alleged in the indictment.

_____ GRANTED

_____ DENIED

[Logo] U.S. Department of Justice
United States Attorney
Northern District of Texas

1100 Commerce St., 3rd Fl.
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Telephone 214.659.8600
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November 13, 2003

J. Craig Jett
Thanksgiving Tower, Suite 2000
1601 Elm Street
Dallas, Texas 75201-4718
Fax 214.979.0001

Re: *United States v. Keshia Cherie Ashford Dixon*,
3:03-CR-055-P

Dear Mr. Jett,

Since you have chosen not to share the basis of your theory of duress and/or necessity, it is difficult to evaluate what evidence in my possession may be beneficial to Dixon.

Please be advised that Thomas Earl Wright, Jr. told law enforcement on February 27, 2003, the following:

1. Wright and Corey Sanders were with Dixon at a gun show. At Dixon's request, they initially scouted out the different types of guns available, and showed Dixon which ones to purchase—because she did not know anything about guns.

2. Wright was in possession of currency belonging to Dixon, which he gave to Dixon for the purchase of the fire-arms. Wright habitually took most of Dixon's money and

gave her what he felt she needed to keep her from losing it all.

3. Wright and Sanders gave Dixon $115 each from their own money, for Dixon to purchase each of them a Hi-Point .380 cal semi-automatic pistol. They wanted Dixon to buy the guns for them because they had both been convicted of felonies in the past, and because Wright did not have an ID card.

4. The shotgun shells in Dixon's residence belonged to Wright.

Please be advised that Corey Sanders told law enforcement on June 3, 2003, the following:

1. Sanders and Wright were with Dixon at a gun show. At Dixon's request, they initially scouted out the different types of guns available, and showed Dixon which ones to purchase—because she did not know anything about guns.

2. Sanders and Wright gave Dixon some of their own money, for Dixon to purchase each of them a Hi-Point .380 cal semi-automatic pistol. Sanders provided $80 to Dixon. Sanders never took possession the pistol.

Thank you for your attention.

JANE J. BOYLE
United States Attorney

/s/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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3:03-CR-055-P
November 17-19, 2003
Dallas, Texas

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UNITED STATES OF AMERICA,

VS.

KESHIA CHERIE ASHFORD DIXON.

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BEFORE THE HONORABLE JORGE SOLIS
UNITED STATES DISTRICT JUDGE, AND A JURY

---

APPEARANCES

FOR THE GOVERNMENT: U.S. ATTORNEY'S OFFICE
1100 COMMERCE,
THIRD FLOOR
DALLAS, TEXAS 75242
BY: MS. CANDY HEATH
MR. PATRICK McLAIN

FOR THE DEFENDANT: MR. J. CRAIG JETT
1601 ELM STREET, SUITE 2000
DALLAS, TEXAS 75201

OFFICIAL COURT
REPORTER: SHAWN McROBERTS, RMR, CRR
1100 COMMERCE, RM. 1654
DALLAS, TEXAS 75242
(214) 753-2349

[263] WALTER PENNINGTON,

TESTIFIED ON DIRECT EXAMINATION BY MR. McLAIN AS FOLLOWS:

* * * *

Q. Mr. Pennington, what do you do for a living these days?

A. I am a federal firearms licensed gun dealer.

* * * *

[264] Q. What is the name of the company that you either work for or own?

A. Texas Star Gun Sales.

Q. Is that your company? Do you own it?

A. Yes, sir.

* * * *

[268] Q. All right. Now, were you running a booth at Dallas Market Hall on the 4th of January of this year?

A. It is not a booth. It is a set of tables.

Q. A set of tables.

A. Yes, sir.

* * * *

[269] Q. Do you recall from way back in January making a sale to someone named Keshia Ashford? Do you have a recollection of that?

A. I do.

* * * *

[275] Q. Now, there is two at the top I want to focus in for just a moment. 12-A says, "Are you the actual buyer of the firearm listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm on behalf of another person." What is that all about?

A. That is mainly a straw purchase transaction.

Q. What does straw purchase mean?

A. Straw purchase is the person that buys the gun for another person.

Q. What if Ms. Ashford came up and said; "I want to buy this for my buddy here, Tom. I am going to buy it for him."

A. You cannot do it. I would not sell it to her.

Q. Is that your rule?

A. That is federal rules.

Q. Was there anybody with her that day she was buying weapons, as far as you remember?

A. As far as I remember, there was I think two men with her.

Q. And men, were they 40s, 50s, 20s? How old were they?

A. I would say late 20s, early 30s, but I am not sure.

Q. How do you know these guys were with her? What was it [276] about them that made you say they were with her?

A. They had walked up with her.

Q. Were they helping her select the firearm?

A. They were looking at firearms with her.

Q. Did you tell if they were the ones picking it out or choosing it?

A. No, it did not appear to me.

Q. Did they seem to be participating in the sale in any way as far as advice or telling her what to do or what have you?

A. No.

Q. Did you get any hint during that whole transaction that this was maybe a straw purchase, or maybe she was buying it as a gift for them or for them or what have you?

A. No.

Q. Would that have been a concern for you?

A. Had it been a concern, yes, I would not have sold any guns to her.

Q. What is the consequences to you if you let that happen?

A. I lose my federal firearms license, or I can lose it.

* * * *

[285] THE COURT: Mr. Jett.

CROSS EXAMINATION

By Mr. Jett:

Q. Good morning, Mr. Pennington,

A. Good Morning

Q. My name is Craig Jett. I represent Ms. Ashford. Are these gun shows pretty busy places?

A. Yes, they are.

Q. Lots of people there?

A. Most of the times; yes.

Q. And lots of guns get sold?

A. Yes.

Q. And are you kept pretty busy during the whole time you are there?

A. Not the whole time; no, sir.

Q. But sometimes I guess you get busy with looking at different things and having to deal with customers and wait on more than one person at a time?

A Well—

Q Is that true?

A. Yeah, that is true.

* * * *

[288] Q. You do recall that there were a couple of young black men with the lady who bought the two guns.

A. Yes.

Q. And you do recall them looking at guns and discussing the guns. Is that correct?

A. Somewhat.

Q. And were you dealing with other customers at the same time?

A. No.

Q. Were there other customers there?

A. There may have been.

Q. How many tables do you set up there?

A. Ten.

Q. Over what area do they take?

A. They are eight foot tables, and about 30 inches wide.

Q. So they are set up—

A. In a horseshoe.

Q. In a horseshoe?

A. Correct.

Q. So you have 80 feet worth of tables there. Is that right?

A. Yes.

Q. In a horseshoe?

A. Right.

* * * *

[290] Q. Well, is that where you do all your paperwork?

A. The last table; yes, sir.

Q. And that is the one that is the bottom of the U?

A. You could figure 35 feet maybe; yes.

Q Okay. And at the bottom of the U, that is where you keep your paperwork?

A. The bottom of the U? No, that is where I have got guns.

Q. Okay.

A. I am at the top of the U on the fifth table side.

Q. Okay. So you are at the top is where you sit?

A. Yes.

Q. So then at the bottom of the U would be another 30 or 40 feet away.

A. Correct; yeah.

Q. And so somebody could still be—You would be working on paperwork, and somebody could be 35, 40 feet away looking at firearms. Is that right?

A. Yes, sir.

Q. And you wouldn't be able to hear what somebody was saying 35 or 40 feet away, would you, if they are not talking to you?

A. Not necessarily.

Q. And did Ms. Dixon come in and browse around?

A. Who now?

Q. Did Ms. Ashford—

A. I can truthfully say most people browse around.

[291] Q. So these two guys with her browsed around as well?

A. Correct.

Q. And both of these two guys also asked you about guns, didn't they?

A. I don't recall that.

Q. Did they ask your wife about guns?

A. I don't recall that. You need to ask her about that, because I am not sure.

Q. You didn't hear them or observe them ask her about guns?

A. No.

Q. Certainly they could have asked her about guns and you wouldn't notice because you would be waiting on another customer?

A. I could be.

Q. But you don't remember enough detail about this transaction to know what happened, do you, in that regard?

A. The physical being there I don't remember so well. I am kind of fuzzy on it. All I know is I did the paperwork for her.

Q. Do you recall that one of these young men actually picked out the guns?

A. No, sir, I don't.

Q. When she did the paperwork, do you recall that one of the young men was standing right there with her?

A. Most people do stand back behind while the person that [292] they came with sits down and does paperwork.

Q. So you think that you recall one of the men standing right there with her while she filled out the paperwork?

A. Could possibly have.

* * * *

[296] PATSY JANE PENNINGTON,

TESTIFIED ON DIRECT EXAMINATION BY MR. MCLAIN AS FOLLOWS:

* * * *

[297] Q. Do you have set responsibilities in running Texas Star Gun Sales?

A. Yes, I do.

Q. What do you do for the business?

A. I help him work the shows as far as selling, and provide money to run the business. He does all of the inventory and the paperwork, but I am there to support him in the setting up on Fridays, and we take down the shows on Sundays, and then help in the weekend of the selling of the products.

* * * *

[300] Q. Do you recall ever having a customer come by your table by the name of Keshia Ashford?

A. I can't remember that specifically; no.

Q. All right. I want to take a moment. I have to grab—Ma'am, if you had a customer come by, your table and purchase a firearm from you, would either the form 4473 or the person's identification card jog your memory about that particular person; possibly jog your memory?

A. It could.

* * * *

[301] Q. What do you recall, after you have had a chance to look at this document?

A. She was a lady that—Our handguns, if I am standing in the center of the way we had our tables set up, our handguns were on the left on the end, and she was the lady that walked up to the Hi-Point firearms. She had someone else with her. She walked up several different times and kept looking at this particular firearm, because we had a number of them sitting there, and they were different models.

And then she went over—There is another vendor catty-corner to us that has a very similar firearm to ours, and [302] she went down to his table and then down that aisle several times. So I remember that very distinctly.

Q. Why does that stick in your mind?

A. Because the amount of time that she was spending at our tables, and the fact that she was looking so closely at the firearm. Women generally don't spend that length of time with firearms, because as a rule they don't know that much about them. And for a woman to stand and look at a firearm that long makes me know that, you know, I need to be aware of it, first of all, if I need to help, because they may have questions about "Why is this nine millimeter better than a .380? Why is this particular firearm, why does it not cost as much as some of the other firearms." All kinds of questions.

And then the amount of time that they took at our table, and then going over to the vendor from Bryan who was catty-corner from us. It is just unusual. It was unusual for a customer to spend that much time with us and the other vendor.

Q. You mentioned that someone was with her. Do you remember anything about that person or persons?

A. Only that—She seemed to be the one that was—She didn't know that much about them, and it appeared that possibly she was needing some information that the person that was with her was possibly providing. And I don't know that for sure.

Q. Male, female, young, old?

* * * *

[303] A. Male.

Q. Young, old? Anything about that person?

A. Same age; about the same age as the lady.

Q. Anything else physically about the person that you remember?

A. No.

Q. Do you remember independently on your own whether or not she purchased any firearms from you?

A. Yes, she did.

Q. What did she purchase?

A. Two of the Hi-Points.

* * * *

[304] Q. Yes, ma'am. Do you recall anything about this lady who bought these two pistols and this transaction? And I will start with physically. Anything about her physically?

A. She seemed average to me. Just seemed—She wasn't quite sure about the firearms themselves as fat as the types and that type, but as far as her appearance she was average.

[305] Q. Regarding the observation you just said, was she nervous?

A. No, not nervous. I just don't—

Q. Did she seem anxious at all?

A. Maybe a little nervous, but more that she wasn't—She didn't feel, or to me it didn't seem like she knew exactly which one to buy. If you have an idea of what you want, then you pretty much your behavior is such that, "Oh, yeah, that is what I want. This is what I like. I want this type of firearm." She didn't seem real secure in that.

Q. Did her nervousness or insecurity or petulance seem to be coming from fear or anxiety or anything like that, from what you could tell?

A. No, I wouldn't say that.

Q. How about the person with her? Do you recall anything about the way he was behaving?

A. Only in that the person seemed to be providing her some information. But I didn't hear it, so, I mean, that was just in body language

Q. Did he seem to be in charge? Did he seem like, for instance, he was really the one who wanted the weapon and she was just buying it for her for a gift or whatever?

A. Probably, Probably.

Q. Okay. Anything else about her demeanor? Do you remember relaxed, uptight, friendly, unfriendly?

A. Not really. Just she seemed unsure.

[306] Q. Did this person follow her everywhere she went, from what you recall?

A. Yes. Yes.

Q. Okay. Did he seem to be in charge of her?

A. I can't say.

Q. Okay, What is a straw purchase?

A. If you came to me and you wanted to buy a firearm and you said to me, "I am going to buy this, but I am actually buying it for this person here," that is a straw purchase.

Q. What if I was with my wife and I said, "I am going to buy this for my wife"?

A. Then as a gift purchase for her, that is very different.

Q. Okay. What if I was with my friend Bubba and I said, "I am going to buy this for Bubba"?

A: No.

Q. Why can I do it for my wife but not for my friend Bubba?

A. Well, there is an obvious connection between you and your wife, you know. And we know for sure, as best as we can, that that is being bought through you for your wife. Preferably if we know that is going to happen, we would prefer and nine times out of ten have her fill out the paperwork, put the gun in her name, because we want ourselves—As far as our business, we don't want any question to come back on the straw purchase.

Q. This straw purchase business, is that a Pennington or Texas Star Gun Sales rule?

[307] A. No, no, no. That is a federal rule, a federal law.

Q. Was there any indication of a straw purchase, from what you can recall, between this young lady who bought these two Hi-Point .380 pistols and this person?

A. Not to my knowledge; no.

Q. Did you inquire from her or get any information about what she was doing buying two of them?

A. Any time that I am selling—

* * * *

Q. Did she give you an answer?

A. Gift.

Q. I am sorry?

A. Yes, she did.

Q. Did she explain anymore than gift, or did she just say "It is a gift"?

A. Not that. I recall; no.

Q. Did she refer to both of them as gifts or one of them?

A. I don't remember.

Q. You don't remember that?

A. I don't remember that.

* * * *

[308] CROSS EXAMINATION

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[309] Q. But totally there would be thousands of people?

A. We would hope; yes; could be.

Q. And you all have it sounds like a pretty big set-up if You have ten tables worth of guns.

A. Yes, we do.

Q. And you sell handguns, long guns. What else do you sell?

A. Well, we have a few lasers.

Q. You say a laser. What is that?

A. They are an internal laser beam for the Glocks primarily, but we have some for the Berettas and Taurus. But they are an internal laser beam.

Q. Is this a separate item that you sell?

A. Yes, it is.

Q. Do you fasten it onto the firearm?

A. It goes inside.

Q. So you can buy the firearm with or without it?

A. Yes.

Q. Does it create a red dot like this?

A. Yes. It pulsates.

* * * *

MR. JETT: Q. The lasers you are talking about, they [310] create a red dot like this?

A. Pulsating; yes.

Q. What they do is they show you where the gun is aimed. Is that right?

A Yes.

Q. It is set up so it is aligned with the firearm with the barrell; it points the same way as the barrel does?

A. Yes.

Q. So it is an aiming device?

A. Yes.

Q. And it tells somebody where they are aiming the gun?

A. Yes.

Q. And it also tells somebody if they are a target. Right?

A. Yes.

Q. Now, you recall that there was the lady who bought these two Hi-Points, and there was somebody with her the whole time.

A. Yes, sir.

Q. Were both of these individuals African-American?

A. Yes.

Q. And you said that she was at the table and looked kind of undecided. Is that right? And he was talking to her?

A. I would say yes. I mean, she was undecided. She wasn't sure of the firearm she wanted.

Q. You saw another young black man with these two folks, did you not?

[311] A. I remember one other for sure. I don't remember two others; no.

Q. But you do recall that these people, at least the two people that you remember, were at your table and they walked away and then they came back. And do you remember how many times they came back?

A. Several.

Q. And each time that the woman came back, the man was with her. Is that correct?

A. Or in the near vicinity.

Q. And he was talking to her, from what you could see?

A. Yes, sir.

Q. Okay. And I guess you have other customers, or you did have other customers at the same time?

A. Possibly.

Q. You said you are looking around a lot. I guess that is to make sure to see what other people—see if there are any other customers that need help?

A. And just to keep an eye on everything. Of course, if Walt is not busy he is there to help.

Q. But it he is busy with paperwork, his eyes are focused on the paperwork in front of him. Right?

A. Uh-huh.

Q. So you would be the set of eyes there?

A. Uh-huh.

* * * *

[312] Q. So you are not watching people all the time when they are at your table, are you?

A. Well, I would say 95 percent of the time I am; yes.

Q. Well, if you have another customer at the table, then you have got to divide your attention between more than one customer, don't you?

A. I always acknowledge them and ask them to wait until I am finished.

Q. You didn't hear the conversation between the lady and the man about the gun, did you?

A. No, sir.

[313] Q. But you did conclude after watching them that you thought she was buying the gun for him.

A. One of them I felt sure, because it was a gift. I can't say both.

Q. That is because you asked her and she said it was a gift?

A. Uh-huh.

Q. Of course, if she had said, "Well, no. I am really just buying this for my friend here and his buddy," you wouldn't have made the sale, would you?

A. That is correct. I would not have.

Q. So if somebody is going to buy a gun for somebody else as a straw purchase, then they have to make a representation that they are not making a straw purchase. Is that right?

A. If we know that it is a straw purchase we are not going to sell it.

Q. I understand if you know that, but my question to you is, in order for somebody to make a straw purchase successfully, that person would have to tell you that it is not a straw purchase. Is that right?

A. It shouldn't even be a question.

Q. I understand it shouldn't be a question, but I am saying if a straw purchase was being made, then in order to successfully do it somebody would have to tell you it is not a straw purchase.

A. That is correct.

[314] Q. Now, that actually is really pretty hard to tell if something is a straw purchase or not a straw purchase, isn't it?

A. If it is or if it isn't.

Q. Yes, ma'am.

A. I guess you could say that.

Q. Now, did you see the money exchange hands for this transaction?

A I don't remember.

Q. I guess you didn't see the man give the woman any money, did you? Or did you see that?

A. I wouldn't have. There would have been no reason for me to.

Q. Well, if they were standing there by your table and he gave her money, you might see that.

A. If that had been the case.

Q Or if they went off somewhere else and he slipped her some money, you wouldn't have seen that, would you?

A. No.

Q. Do you all ask for social security numbers on the 4473 forms?

A. No, we don't.

* * * *

[315] MR. JETT: Q. After the decision was made to purchase the gun, did you have anything more to do with these two folks?

THE WITNESS: A. Well, I had to—Our supplemental supplies are underneath. We only keep one of each firearm out, so the additional firearms are down under the tables. So I had to pull the other one out and then take it down to Walt, and that is all I had to do with them.

Q. So you didn't observe the paperwork process?

A. I don't remember that, sir; no.

Q. Do you remember the man standing there with the woman while she filled out the paperwork?

A. I don't remember that. That would have been unlikely.

Q. Well, but you don't handle the paperwork?

A. No, sir, I don't.

Q. So it wasn't anything you would notice necessarily?

A. I could have noticed it, but not necessarily; no.

Q. But you do remember him being with her the entire time?

A. Yes, I do. Yes, I do.

[316] Q. Do you remember when the transaction was completed that he took the package?

A. I don't remember that; no.

* * * *

JOHN GRAVES,

TESTIFIED ON DIRECT EXAMINATION BY MR. McLAIN AS FOLLOWS:

Q. What is your job, sir?

A. I am a federal firearms dealer, federal firearm licensed dealer.

* * * *

Q. Do you own a company, or do you work for somebody else?

A. Business for myself.

Q. What is the name of your business?

[317] A. Graves Guns.

* * * *

Q. Were you participating in a gun show as a federally licensed gun dealer on the 11th of January of this year?

A. Yes.

* * * *

[324] Q. Do you recall anything about the lady who purchased these items or behavior or what she told you about it?

A. Well, she had a few friends with her. She walked up to the table and looked at the guns a few minutes, and she picked out these two and she said, "These are the ones I want to buy."

Q. You used the term "few friends." Had you ever met this woman before?

A. No.

Q. What told you that these people that were with her were her friends?

A. They come up as a group. And as a rule, most of the time the people that go to these gun shows, very few of them come by themselves. Like anything else, you enjoy doing anything, I guess, when you have someone with you, just for the company or whatever. But I knew that they were together. Just the way they acted and everything. But Ms. Ashford is the one that picked out the guns and said she wanted to buy those.

[325] Q. Did it seem like she was speaking for somebody else—in other words, she was buying it for someone else that really wanted them?

A. No.

Q. Why do you say that? I mean, why do you even remember whether that was the case?

A. Well, I have people at the gun shows a lot of people aren't able to buy guns because they do have bad history, background, or whatever, and they look at the guns and talk among themselves.

In fact, last month there was several people come up to the tables and wanted to purchase a gun, and they discussed it among themselves and said, "We will be back in a minute." And they came back. And this one girl had the money, and I told her, "I am not going to sell you the gun. I can't sell you

the gun," And she said, "Why?" And I said, "Well, you know, I don't believe it is going to be for you." And they kind of got a little bit upset, but they left.

But like I say, when she wanted to purchase the guns, I had no doubts she was in my mind, because she was buying them for herself.

Q. Why? I mean, are these two weapons at all unusual for people to buy?

A. No, not really. The Jennings is an inexpensive gun. I sell quite a few of them. The Masterpiece Arms, a while ago I [326] said it was an assault pistol, which it is an assault-type pistol. Most of the people that buy them, they love to shoot. They like to shoot. And I sell them to women as well as men.

Q. Just target practice shooting, or personal protection, or what is it used for?

A. The Masterpiece Arms type is more or less for fun, just take it out and do some shooting. Now, the Jennings, most of the people that buy these are just an inexpensive self-protection gun.

Q. Yes, sir. Did you have any straw purchase concerns during this entire transaction?

A. Sir?

Q. Did you have any concerns at all during this transaction that you thought there might be a straw purchase, or had to take any steps to assure it wasn't?

A. No.

Q. Did the—By the way, I don't think you said. Do you recall how many persons were with her?

A. I am going to say approximately three.

Q. Male, female?

A. I am thinking that there was a couple of males, at least a couple of males; maybe a female. But I think there was more male than female with her.

Q. And at any time did you see anything that looked like she didn't know what she was doing and she was going to have to get [327] direction from anyone of these persons she was with?

A. No.

* * * *

[332] CROSS EXAMINATION

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[333] Q. We were talking or you were talking about a straw sale. Now, if you knowingly made a straw sale or made a sale to a straw person, then you could lose your firearms license, could you not?

A. Yes.

Q. And if you knowingly sold a gun to somebody who was prohibited from having a gun, you could also lose your firearms license.

A. Correct.

* * * *

[336] Q. Now, you said that when these two firearms we are talking about were sold, you said there was a group of people together?

A. There was two or three others, as far as I remember, that was with her; yes.

Q. Okay. And you said two or three. Were two of them kind of young black men?

A. As far as I can recall.

Q. And was there another one who appeared to be an Hispanic man?

A. That I don't recall.

Q. But you remember there was—You think there was a third person?

A. Yes. I am saying I thought there was two or three, but couldn't swear to either one of them.

Q. And they all appeared to be looking at the guns?

[337] A. Well, to a certain extent; yes.

Q. Well, the young men who were with the lady who bought the gun, they did appear to be looking at the guns, did they not?

A. Well, yeah; they were looking at the guns also.

Q. So she certainly was not the only person looking at the guns in this little group.

A. No.

Q. Had you seen them earlier in the day?

A. That I don't recall.

Q. You couldn't tell whether they had been wandering around the gun show?

A. No.

Q. You don't notice everybody who wanders through, do you?

A. Well, I notice what I call regular people. I see them from—There are people that go from Houston to Fort Worth just to go to the gun shows just to walk around. But now, as far as recalling seeing them before they made the purchase, I do not.

* * * *

MR. JETT: Q. Now, you testified as well that if you thought that there was a straw purchase, you would not have made the sale.

[338] THE WITNESS: A. Exactly.

Q. Now, if somebody had experience buying guns, then they would understand that you couldn't make a straw sale. Is that right?

A. Sure; yeah.

Q. And I assume you didn't see that one of these men gave the lady who bought the gun some money?

A. No.

Q. But they certainly could have done that some place where you could not see them.

A. Yeah. It is entirely possible; yes.

Q. And somebody could have been looking at guns somewhere else and then decided to buy your gun.

A. Possibly.

Q. Now, do you recall that when the form was filled out, that the young men were there with her?

A. Yes.

Q. Were they standing over her talking to her?

A. No. They were kind of actually in the background, so-to-speak, When she told me what gun she wanted, I directed her to the chairs to sit down and fill out the forms, and the other ones just, like I say, was in the background then.

Q. Just stayed back and watched?

A. Yes.

Q. They didn't look at anymore guns?

[339] A. As far as I can recall, no.

Q. So once the sale decision was made, then the lady filled out the forms, and the two guys just sat in the back like there was nothing else they needed to do.

A. Say it again now.

Q. The lady filled out the form, and the two men just kind of stood back like there was nothing else they needed to do.

A. Well, once she told me what guns she wanted to buy, like I said, I directed her to the yellow forms, and then I concentrated—While she was filling out the form, I was concentrating on the tables again.

* * * *

[340] MR. JETT: Q. After the form was filled out and the guns were purchased, do you remember the young men, one of the young men taking the package and walking off with it?

THE WITNESS: A. I took the money from her and handed her the firearm.

Q. Do you remember her handing the package to them as they walked off?

A. No, I do not.

* * * *

[341] BRIAN KENDRICK,

TESTIFIED ON DIRECT EXAMINATION BY MS. HEATH AS FOLLOWS:

* * * *

Q. Can you tell the jury a little about your background, education, and work experience?

A. I have been a federally licensed firearms dealer since about 1986. Prior to that for three years I worked in a gun shop, Oshman's Sporting Goods, and in between that time I also worked at Wal-Mart as a department manager for the firearms department.

* * * *

[342] Q. Now, with regard to selling firearms, what company do you currently work for?

A. KK Sales. That is my company.

* * * *

[343] Q. Let me direct your attention back to January of 2003, specifically January 11th, and ask you if you were at the Big [344] Town Gun Show in Mesquite, Texas?

A. Yes.

* * * *

[349] Q. Please describe who came to your table, what individual came to your table.

A. Okay. Ms. Ashford came to the table, and she was looking at the—I remembered her standing there for a while because I was helping another customer. Then when I came to her and asked if she needed help, she indicated she wanted the MPA10. And so I, directed her down to the paperwork

table, and she went down over there and started filling out the 4473 form.

Q. Did she have anybody with her at the time?

A. There were several, two or three younger black males.

Q. Did they come to the table with her to pick out guns?

[350] A. No. They sort of stood around. I figured they were her kids.

Q. When you say younger, do they look about what a children's age may have been?

A. I thought maybe 16, 17 years old; something like that.

Q. Did they at any time take part in the transaction, come up to the table, pick out guns, handle guns?

A. No.

Q. At any point during the transaction did you see her consult with them about what guns she may need to buy?

A. No. She sat down and did the paperwork. She was very pleasant. And she filled out the paperwork and that was it. She was pretty quiet.

Q. You said she was pleasant. Did she seem rushed at all about getting the firearm?

A. No. She just seemed like a real nice person.

* * * *

[355] Q. Now, did Ms. Ashford have any questions about these guns, the use of the guns, or maintenance or cleaning, repair, ammunition, anything like that?

A. No.

Q. Approximately how long was that transaction for the sale of the Masterpiece Arms?

A. Oh, it takes about five minutes from when they start the paperwork. They go through the paperwork, and then when you call it in it goes pretty quickly.

Q. Did you receive cash, check, credit card?

A. I don't remember offhand. I don't remember.

Q. Once you received payment for the gun, did you give the gun to Ms. Ashford?

A. Yes.

[356] Q. And then did you see Ms. Ashford again during the gun show?

A. Yes. She came back a second time and asked me about a delay, that she had gotten delayed. And at the time I didn't remember. I said, "I thought you got a proceed." And I pulled out the paperwork. I said, "No, you got a proceed." And I said, "You received the firearm."

And she said, "No, at another table." So I gave her the number off the form, the NTN number, and she took it back to the other table, I guess.

Q. When she came to the table, did she come to the table by herself that second time?

A. Yes.

Q. Were the other young males with her?

A. Not at that time I don't remember them being there.

Q. Okay. Did she have anymore firearms in her possession or any other packages in her possession that you could tell?

A. I didn't see any.

Q. Did she indicate what table she had gone to and received a delay?

A. No.

Q. Did that cause you concern?

A. Well, I said, you know, "you got proceed over here." And then she went, and then she came back later and purchased another one. And she said she got it all cleared up over there; they had made a mistake.

[357] Q. Now, when she came back the third time, was anybody else with her?

A. Those kids were still with her.

Q. What is the passage of time, as you recall, between the first purchase of the firearm and the second purchase?

A. I think it was a couple of hours, if I am not mistaken. It was a pretty busy show, but I think it was a couple of hours.

Q. At the next purchase what is going on? Tell the jury about her coming to the table.

A. Well she came up the same way, basically. She said she wanted that Hi-Point carbine. And I directed her down there to fill the paperwork out. We went through the same procedure again. I called it in, she got a proceed, and then she paid and left.

* * * *

[358] Q. Now, on this next gun, the Hi-Point, was there any problem at all in that transaction?

A. No. It went through and she paid and left. Then she [359] returned again because I had forgotten to put the magazine in, the magazine for the gun. She came back and asked me, "Doesn't this gun come with a magazine?" And I said, "yes. I am sorry." Because at that show you had to take the magazines out, and I put it under the counter.

* * * *

[366] Q. Now, since that gun show you have not seen Ms. Ashford in any other gun shows?

A. No.

[367] Q. Do you recall seeing any of the young men that were with her at the gun shows after that?

A. No. And I have to admit, I didn't see them very well. They just—They weren't involved in anything. They looked like they were bored.

Q. They looked like they were bored at the gun show?

A. It is like when I used to go shopping with my mother—

* * * *

MS. HEATH: Q. And during either of the two transactions where Ms. Ashford was buying these firearms, did the young males seem to be the ones saying "Buy this one," or "I want this one"?

THE WITNESS: A. No.

Q. At any point did you feel that there was any indication that Ms. Ashford was buying the guns for somebody else?

A. No.

Q. Do you look out for that?

A. Yes because that is against the law. And the first question on the 4473 asks the person "Are you the actual buyer of the firearm?" If they indicate no, they are not, the sale can't proceed.

Q. Now, do you ever ask them what they are going to do with the guns or why they want these particular firearms?

A. No, because there is a lot of people they like different [368] types of guns. I have sold that same type of firearm to elderly gentlemen and younger people. It is not really my business what they are going to do with it. Most people go out and go shoot in the woods or something, or they go out there plinking. That is what you call it.

Q. The information that is provided to you by the customer on 4473 forms, is that information that you rely on in order make the transaction?

A. Yes.

Q. And is that information you rely on in order to keep your valid federally firearm license?

A. Yes.

MS. HEATH: Your Honor, pass the witness.

THE COURT: Mr. Jett?

CROSS EXAMINATION

By Mr. Jett:

Q. Mr. Kendrick, if you make a straw sale to somebody, you can lose your license. Is that right?

A. Yes.

Q. And if you knowingly sell a firearm to somebody who is prohibited, you also could lose your license. Is that right?

A. Right.

Q. Did you ask her for her social security number?

A. No, I didn't.

* * * *

[370] MR. JETT: Q. Now, you recall that there were three [371] young men with this lady at the time?

THE WITNESS: A. Well, there was two or three. I didn't—

Q. Were two of the—two of them of African descent?

A. African American descent; yes.

Q. And was there a third person of Hispanic descent?

A. Not that I know of. I thought they were all African-American.

Q. Can you describe the clothing?

A. No.

Q. Isn't it true that—Well, let me ask you this. Was this a busy gun show for you?

A. Yes.

Q. So you had a number of people at the table at a time?

A. Yes.

Q. So when you are helping one customer you can't help another customer?

A. Well, it took a while, before I could get to her because there were several other customers I had to help first.

Q. I understand that. But you are not watching her while you are helping another customer, are you?

A. No.

Q. You would be trying to focus on that particular customer?

A. Right.

Q. And you would also—If you were trying to make a sale [372] and calling the NICS information, you would be focusing on that?

A. Yes.

Q. So you couldn't say that you were observing her the whole time she was there at your table?

A. No.

Q. And you couldn't tell us what interaction there was or was not between her and these people that she was with.

A. No.

Q. And you couldn't tell us whether they were telling her what to buy or not telling her what to buy?

A. No, I couldn't tell you that, when I wasn't focusing on her.

Q. And you don't know whether they gave her the money to purchase the firearm, do you?

A. I don't know that either. If I wasn't observing her I wouldn't have known that.

Q. Now, I want you to think back. Do you remember that when she was filling out the form that there was one of these guys standing right there with her?

A. They were there, but they didn't have any interaction with her. Like I said, they just looked like they were bored.

Q. Now, when she came back, you said she wasn't carrying the first gun that was purchased. Is that right?

A. I don't remember offhand. I didn't see anything in her [373] hands. But she came back to ask about that delay, and at the time I didn't remember her because—I knew she looked familiar, and I said, "I thought I made the sale." And so I pulled it up and said, "No, you got a proceed and you received the firearm."

Q. Somebody wouldn't just leave a firearm just sitting around in the gun show, would they?

A. No. A lot of people just take them out to their cars and come back in. They get stamped on the hand so they can come back in.

Q. Or somebody else could be carrying it?

A. Yes.

Q. So it could have been carried by one of these people she was with?

A. Uh-huh.

Q. Now, when you weren't watching her and were watching these other customers, you can't tell us that one of these other people showed her what gun to pick out, can you?

A. No, I couldn't say that.

Q. Now, you said she came back a third time, and again there were no packages in her hand. Is that right?

A. I don't remember. I just remember the third time she came back and bought that Hi-Point carbine.

Q. You don't remember her—What was—Let me back up. What was the first firearm that was purchased?

[374] A. It was the MPA10, Masterpiece Arms.

Q. That is the big pistol with the clip on it?

A. Yes.

Q. And that would—I mean, how big a box does that come in?

A. The box is about this big. It comes apart and fits into little compartments in the cardboard.

Q. So you put your hands up. Is that about—

A. About a foot and a half maybe.

Q. Okay. Foot and a half square?

A. Just about. It is more of a rectangular shaped box.

Q. So about 18 by 16; something like that?

A. That would be close.

Q. So it would be pretty obvious if someone was carrying something that big around with them, wouldn't it?

A. Yes.

Q. And you don't remember her carrying something back when she came to see you the second and the third time?

A. No. I am sorry. I can't remember if she had it in her hand or not.

* * * *

[376] REDIRECT EXAMINATION

* * * *

[378] Q. And you indicated that on the second and third time that Ms. Ashford came back to the table, you do not recall whether or not she may have had a box that she placed down as she was looking at the next gun?

A. I don't recall that.

* * * *

MS. HEATH: Q. She didn't have the long box with the rifle, did she?

THE WITNESS: A. No, she didn't.

Q. Did she have any other packages with her that you recall [379] at this time?

A. No.

Q. Had she indicated whether or not she had already left the show and come back?

A. No.

* * * *

[384] GERALD CHANDLER,

TESTIFIED ON DIRECT EXAMINATION BY MR. McLAIN AS FOLLOWS:

* * * *

[385] Q. Do you work for somebody or do you have your own business?

A. I was working for Bill's Gun Shop. Mr. Carroll was the owner.

* * * *

[386] Q. On the 11th of January, did you ever have a customer by the name of Keshia Ashford come to you?

A. Yes, we did.

* * * *

[387] Q. Did she buy anything?

A. She attempted to make a purchase.

* * * *

[391] MR. McLAIN: Q. I will save you the trouble. We will move on to the next thing you noticed. After Mr. Carroll made the call, what was the next event that happened in this transaction?

THE WITNESS: A. The next thing that happened is Mr. Carroll passed it back to me and informed me that it was a delay.

Q. Did you all tell Ms. Ashford about that?

[392] A. Yes.

Q. What was her reaction?

A. She was upset about it. She stated that she had previously purchased weapons that day and she had not gotten a delay.

Q. Did you continue to handle this situation at that point?

A. At that point I told her that if she would check back in 30 minutes, that is what the normal procedure is—give them a little time, and sometimes they come back through as an approval. It is just a time thing. She was informed that she should come back.

Q. Did she go away—

A. She went away for a period of time and then came back, and at that point I passed it off to Mr. Carroll because she was very agitated about still being delayed.

Q. Did she get specific about what agitated her? Was it unable to get the weapon, upset about the fee that you kept?

A. At that point she didn't know about the fee.

Q. Okay.

A. It was still—We were still in a waiting period at that time. She was very agitated because of the fact that she had been approved previously that day, and she voiced that to us

that she had been, and wanted to know why we couldn't approve her; she had been previously approved.

Q. Was she alone during this time?

[393] A. There were two gentlemen, two young fellows I would say in their early 20s that were in the background.

Q. Can you describe them to the extent you can remember what they look like?

A. No, sir. They were—The only thing I can tell you is that I would say they were in their early 20s, black males, one was fairly thin. That is basically it.

Q. Did she have any interaction with them, or how did you know that she was with these two fellows?

A. Well, in the beginning I assumed that they were together, but when she walked away they followed her.

Q. Did they participate at all in her shopping or her execution of this transaction?

A. No, sir. That would be illegal.

Q. Meaning?

A. That would be what we would consider a straw purchase. Any time someone tries to purchase a weapon for someone who cannot, whether it be not old enough or not be able to pass the background check, any time that we see something like that happening we have to call the deal at that point because of the fact that it will get us in trouble for a straw purchase.

Q. Yes, sir. Did you see any indication of that the entire time you had contact with her?

A. No, sir.

Q. Did she seem to at all consult with them during the [394] process, even if they were with her?

A. No, sir.

Q. Did you notice anything about them about their behavior or what they were doing while she was busy working with you?

A. They were just standing in the background.

* * * *

[394] CROSS EXAMINATION

* * * *

[396] Q. You say when the lady came to buy the gun, it was apparent to you that she was with somebody. Is that correct?

A. Someone was with her.

Q. And when she arrived, did you have other customers there? When she arrived—

A. When she arrived? Possibly.

Q. You had other customers. You can't remember?

A. Sir?

Q. You can't remember if you had other customers?

A. I am sure—There is normally 3,000 to 5,000 people that come through the show, so it is possible there were other people milling around the tables; yes.

Q. And it is possible that there were people looking at guns that you also had to attend to?

A. No, sir. Once I am with a customer, they get my full attention.

Q. It is certainly possible she could have come by your table and then left and gone somewhere else.

A. It is possible.

* * * *

[399] Q. Now, when it came back delayed, did—How long did that take, first?

A. Three to five minutes.

Q. And when it came back delayed, was she still standing there or had she gone somewhere?

A. She was standing there waiting.

Q. And you told her it had been delayed, and she didn't like that apparently?

A. No, sir.

Q. At that point did the two young men she was with say anything?

[400] A. No, sir. They were still in the background.

Q. Did they all leave at that point, leave your table?

A. I believe there was a little bit of discussion about the delay, and then I instructed her to come back in about 30 minutes.

Q. Now, you are saying that you didn't see them before they arrived at your table. Is that right? Going back to the beginning of the transaction.

A. That I didn't—They weren't there together. Had I seen them previously at my table?

Q. Yes, sir.

A. No, sir, I hadn't seen them.

Q. And you hadn't seen any of the interaction between them before they got to your table?

A. No, sir.

Q. So you couldn't tell us what may have been said between them. Is that right?

A. No, sir.

Q. You couldn't tell the jury how the decision was made to purchase that particular firearm.

A. No, sir.

Q. And you couldn't tell us who actually made the decision to buy that firearm, could you?

A. All I know is what was told to me.

Q. I understand that. Now, after the three of them left [401] after the delay, did they come back after a while?

A. Yes, sir, they did.

Q. Did all three of them come back?

A. Yes, sir.

Q. And was there a discussion among all three of them and you and Mr. Carroll about the delay?

A. No, sir.

Q. Do you remember that the two young men engaged in a discussion about the delay with the two of you?

A. No, sir. I passed it off. When she came back she was very agitated, and I passed it off to Mr. Carroll.

Q. So you didn't deal—

A. I stood by, but no, I was not involved with the conversation.

Q. But you observed that the two young men participated in the conversation, didn't you?

A. No, sir, I didn't.

Q. Can you give us any further description of these two young men?

A. No, sir. They were not part of the transaction. They were not—They were of no concern of mine.

Q. So you really weren't paying any attention to them?

A. Other than the fact that I observed them in the background; no; and the fact that they did not have any interaction with the purchaser.

* * * *

[402] REDIRECT EXAMINATION

Q. Just to be clear, when you said these young guys didn't have any interaction with the purchaser, you mean whom?

A. Ms. Ashford.

Q. Thank you, sir. And regarding Mr. Jett's other point, from what you observed, was anybody but Ms. Ashford involved in deciding on which weapon she should get and what information she should put on the form and all other aspects of this purchase?

A. No, sir. As I stated previously, that would have null and voided the transaction. For the small amount of money I make on a sale of a firearm, it is not worth the penalties for me as far as me breaking the law for a straw purchase.

Q. If you sensed that these young men were involved in the decision-making or urging her on to make certain decisions, what would you have done?

A. I would have called the deal at that point. I would have told her that I could no longer carry out the transaction.

Q. Did you have the authority at that time to do that?

A. Yes, sir.

* * * *

[403] RECROSS EXAMINATION

* * * *

Q. Is Bill's Gun Shop known for being a stickler about making sure a transaction is not a straw transaction?

A. Yes, sir.

Q. Do you think you have that reputation among the dealers?

A. Yes, sir.

Q. Now, if somebody was to come up to you and say, "Well, I am buying this, but it is a gift for my friend here," would that be a straw transaction to you?

A. Yes, sir.

Q. So you think that somebody has to make it very clear to you that the buyer is buying the gun for himself or herself?

A. It is one of the questions on the form. The first question, paraphrasing, I believe is, "Are you the actual purchaser of this firearm?"

Q. So if somebody told you, "I am going to make a gift of this to somebody," you would say, "We can't do that"?

A. If the person is standing there, no. If it is a gift, that is within the realm of the law.

* * * *

[404] THOMAS CARROLL,

TESTIFIED ON DIRECT EXAMINATION BY MR. McLAIN AS FOLLOWS:

* * * *

Q. Mr. Carroll, what do you do for a living?

A. I used to run a gun shop. I just retired recently.

* * * *

[406] Q. Did you do a show on the 11th of January this year?

A. This year?

Q. Yes, sir.

A. Yes.

* * * *

Q. On that day do you recall if you had any transaction involving a customer by the name of Keshia Ashford?

A. Yes, sir.

* * * *

[408] Q. What is that you are holding, please?

A. This is the federal transaction form we call a 4473, or the yellow sheet. The customer fills out the front with identifying information that we use when we call in to the federal system to get a background check.

The backside of the form we fill out, which designated the location, the date, the identification used, which is driver's license, driver's license number. When we call the FBI they give us a transaction number that is a unique number we put in here. And depending on what response they give us, we mark the form over here. In this case the initial response was delayed.

* * * *

[410] Q. What does all that tell us in a nutshell from 19a to 19c?

A. It tells us the background check was submitted, the identifying number was given, and the initial response was that the transaction would be delayed.

* * * *

Q. Did you inform Ms. Ashford of the delay right away?

A. Yes.

Q. What was her reaction, if anything?

A. As I remember at the time she said, "Well, what does that mean?" And I said, "Well, it means that for some reason they have delayed the approval. It could be anywhere from a couple of minutes to three days before we get an answer back one way or the other."

Q. Did she have a response to that?

A. I think she just said, "Well, what should I do?" And I [411] said, "Just check back with us in a about half an hour."

Q. Did she do that?

A. Yes.

Q. What happened when she came back?

A. I believe that is when she first came back and she said, "Have you got any response yet?" And I said, "No, but I will call them again right now and see if there has been an update."

Q. What happened when you called them back?

A. They said it was still delayed.

Q. What happened when you told Ms. Ashford that that was still the situation?

A. Well, she at that time said, "What is going on here, because I just bought a gun from another dealer here in the show and that it was not delayed?" And I said, "That doesn't sound right. I have never heard of that happening before."

Q. Was she very calm and rational at that point?

A. Yes.

Q. Okay.

A. You know, she was saying you know, "What is going on?"

Q. Anything else she had to say about it?

A. Well, yes. And I said, "Well, I will tell you what. I have never heard of this happening before. If you can go back to that other dealer and get this transaction number he got on his form, that will be different than the one I have, and I will call them back and ask them just what is going on here, [412] because this is very unusual." And she said, "Okay." And I never thought I would see her again. But within a few minutes she came back and she said, "Here is that number."

* * * *

Q. Did you do anything different with that number she came back that she claimed was an approval number?

A. Yes. I called back to the FBI system and asked to talk to an agent, and I said, "Something weird is going on here." I said, "This lady who is trying to buy a firearm from me got delayed, but she just went over at a gun show where we are and bought another firearm from another dealer and was not delayed." And I said, "I have that transaction number." And he said, "Well, let me have it and I will check it." So I did.

* * * *

[413] MR. McLAIN: Q. Mr. Carroll, you had this discussion with him, and then after you had the discussion with the fellow on the phone, what did you tell Ms. Ashford?

THE WITNESS: A. Well, I told her that he told me that it was because we got her social security number.

* * * *

THE WITNESS: A. I told her that the man on the phone said that because her social security number was given on my form and where it wasn't on the other dealer's form, that resulted in a delay.

Q. What kind of reaction did she have to that?

A. Well, she said she would wait a little while and check back a little later was her response at that time.

Q. Did she leave or did you have some more interaction with her?

A. She left at that point.

Q. Then what happened?

A. She came back about 20, 30 minutes later and said, "Well, has it been approved yet?" And I said, "No, and when it goes this long it will probably not be approved until Monday." So she said that she decided that we were ripping her off because, you know, she says, "I can buy a gun anywhere in this show [414] except for you." And I said, "My

hands are tied. I can't sell you a gun without getting an approval. That is the way this system works as far as I am concerned."

So we gave her back her money, less a transaction fee, which we have posted on a sign that once we start a process—This is not a clearing house for people's background checks. We must have money in hand, a receipt written, for the transaction to proceed beyond the initial point. So we say "If you back out or if you get denied, then you are going to forfeit $15 of the money you put up." So we gave her back all of her money except for $15.

Q. What further things did she have to say or reactions did she have, if anything?

A. She was mad. She didn't understand why I couldn't sell her the gun she wanted when she got some other guns from someone else.

Q. What sort of things did you try to do or say to her?

A. Well, I just told her that this is—I told her, I said—I repeated the fact that the social security number evidently made a difference in how they could clear her name, and I don't know anything about that and I will never know, because that is all confidential information. We never know why someone is delayed, denied, or whatever happens to them. But I said, you know, "I just can't do anything else other than give you your money back and say I am sorry."

[415] Q. What was her mood or behavior like at this point?

A. Well, she was still mad, you know, because again, she reiterated the fact that she thought we were doing something since we kept $15 of her money, she still thought—I thought that she thought she was getting the short end of the stick here; it was a scheme by us to just get $15 off of her. And she couldn't understand why if she paid for the gun why couldn't she get it.

Q. Yes, sir. Was she alone during this time?

A. She was alone as far as any transactions. When she came back the second or third time, I thought there were perhaps two men in the background that I don't know if they were either holding packages or just back there with her. They never got into the conversation at all. They never participated in any words to me.

Q. Okay. I would like to talk about what, if anything, you observed about them. Did you see what they were holding?

A. Not really, except the one thing that she showed me when she came back and said, "I bought this gun," it was a pistol and I saw the box and bag. I recognized the fact that it was a handgun. I didn't know what it was or what kind.

Q. Did you ever see them holding that same pistol?

A. Not that I recall, though she didn't have it with her when she came back the second time.

Q. Do you recall the ages or what you took to be the ages of [416] these young men?

A. I would say they were probably early 20s at the most.

Q. Race, build?

A. They were both black, medium. There wasn't anything outstanding about their physiques.

Q. Did they have any interaction with her, talk to her, consult with her, or anything?

A. Not that I saw. As I say, they were just standing in the background, and the only thing that made them stand out is that they were back there watching us talk. And I was aware that they were there and I thought, "Hmm, we are going to have three or four people getting into this thing." But they never even approached the table really.

Q. What told you they were with her other than they were kind of standing around?

A. When she came up I looked up and was talking to her, and then they were there, and when she left they were gone. And the other thing is that in a lot of gun shows, there aren't a lot of black people in the shows as a rule, although, you

know, there are quite a few that come from time to time. But usually they do come two or three people together sometimes.

Q. Yes, sir.

A. They just stand out slightly in a crowd.

* * * *

[418] CROSS EXAMINATION

* * * *

Q. I just have a couple of questions for you. It seems like from your testimony it is apparent that the young lady didn't really get upset with you until it was apparent she was going to lose the $15.

A. Somewhere along that way; yes.

Q. And it also became apparent at that time that there wasn't [419] going to be a gun purchase?

A. Correct. From me; that is right.

Q. Is it the policy of your business to ask for social security numbers?

A. We tell the customer when they fill out the yellow sheet that if they do not give their social security number, and they are not required to, that it may result in a delay in their approval, because that is a locator that the FBI system uses.

Q And the lady who purchased the gun was told this?

A. Yes.

Q. So from that it would be reasonable to believe that she understood that the number enhanced the chance that she would not be able to buy a gun.

A. Not necessarily. We told them it would enhance the fact that she could buy the gun. They would be able to find her in the system easier.

Q. But also it would—It also might enhance the fact that somebody might not be able to buy a gun because it would get cross-referenced with other information.

A. Perhaps.

Q. Mr. Chandler worked for you. Is that right?

A. Correct.

Q. Did he also have a federal firearms license?

A. No.

Q. Did he used to have one?

[420] A. I believe he did years ago; yes.

Q. Do you know why he doesn't have one now?

A. He didn't have a business.

Q. It was—You do remember that these young black men were there and they were holding some kind of packages?

A. Yes.

Q. And you said you saw Ms. Dixon or Ms. Ashford about four times?

A. Yes, I think so.

Q. And each time she did not have a package with her?

A. The first time she came back she did.

Q. And the other three times she did not have a package?

A. I don't think so, but I am not positive.

Q. But you saw these guys lurking off in the background and they were carrying packages?

A. They were standing back there, and I think they had a couple of packages.

* * * *

[421] JOHN COLLINS,

TESTIFIED ON DIRECT EXAMINATION BY MS. HEATH AS FOLLOWS:

* * * *

Q. And with regard to the sporting goods business, does that include selling guns?

A. Yes. I am a federally licensed firearms dealer.

* * * *

Q. Did you work for other companies or do you have your own company?

[422] A. I work for myself.

* * * *

Q. With regard to selling firearms, let me direct your attention back to January 4th of 2003 and ask if you attended the gun show at the Dallas Market Hall?

A. Yes, ma'am.

* * * *

[423] Q. During the January show at Market Hall, did you have an occasion to sell a firearm to a Keshia Cherie Ashford?

A. Yes, ma'am.

* * * *

[424] Q. Could you tell the jury a little about what you recall on that day when this customer came to your table?

A. She walked up, pointed to a gun and said, "That is the one I want." And I said, "Step over here, do your paperwork." I Handed her the form, she filled it out, I called NCIC, and got a proceed, she paid for the gun, and left.

Q. Was there anybody else with her at the time?

A. Yes. There were two young men that were with her.

Q. Approximately how old were these young men?

A. They were 18 to 25.

Q. Did you see them have any interaction with her during the purchase of this firearm?

A. Not with her. They were chatting to each other behind her while she did the paperwork.

Q. And how far away from her would they have been, or how far away from your table would they have been at that time?

A. Standing right behind her.

Q. Did she seem to consult with them at any point about what [425] gun she wanted, the price of the gun, any characteristics of the gun, anything of that sort?

A. Nothing that I noticed.

* * * *

[426] Q. In what type of container did you sell the gun to Ms. Ashford?

A. It would have been in a hard case.

Q. And when she came up to purchase the gun, did she look at any other guns but that gun?

A. No. When I interact—When our interaction began, she said, "I want that one," and pointed to it.

Q. So you did not notice if she was shopping around at all at your other tables looking at other guns?

A. No, I didn't notice it.

* * * *

[432] Q. And if we go back to page three, "important notices," paragraph one, does that paragraph explain when you are allowed to buy the firearm as a gift for somebody, but distinguishing between buying the firearm just for somebody else when they give you money?

A. Correct. That would be a straw purchase, and we are prohibited from doing that.

Q. Do you keep an eye out for straw purchases when you are selling firearms?

A. Yes, ma'am.

Q. And has it happened before that you realize that a straw purchase was happening and you declined to sell the firearm?

A. Yes, I have declined sales because the gun was not for the person filling out the paperwork.

Q. Did you have any reason to believe in the purchase of the gun by Ms. Ashford that she was buying the gun at the behest of somebody else using somebody else's money?

A. No, ma'am.

* * * *

[433] CROSS EXAMINATION

* * * *

Q. Now, you say that you do remember that there were a couple of young African-American men with a lady who bought the gun. Is that correct?

A. Yes, sir.

Q. And they were standing right there next to her?

A. Yes, sir; right behind her.

Q. They could hear all of your conversation?

[434] A. Yes.

Q. And they could observe the entire transaction?

A. Yes, sir.

Q. And so apparently somebody had already made a decision to buy this Tec-22 gun. Is that right?

A. Yes, sir.

Q. Because your testimony has been there wasn't any discussion that you heard about what to buy.

A. No. She walked up and said, "I want that one."

Q. Had you seen these people before at the gun show?

A. No, sir.

Q. When she filled out the form, were these two guys standing right there with her?

A. Behind her; yes, sir.

Q. So they could see what she was doing?

A. Yes, sir. And it is pretty open.

Q. Could you see one of them give her some money to buy the gun with?

A. No, sir.

Q. That certainly could have been done without you seeing it, couldn't it have?

A. I am sure it is possible.

Q. Certainly could have been done before they got to your table?

A. Sure.

[435] Q. And you wouldn't have known anything about it?

A. Correct. If I had known anything, I would have asked questions.

* * * *

[477] it is all about control.

And what you are going to hear is a story about power and control from the people who were there, who were in the middle of it. And you are going to hear expert testimony about what that does to people and how people react and what that did to Keshia Ashford that led her to be here today and this week. Thank you.

THE COURT: Thank you. First witness?

MR. JETT: We will call Ve'Queshia Ashford. Should I go get her, Judge?

THE COURT: Yes, sir.

(Whereupon, the oath was administered by the Court)

Ve'QUESHIA ASHFORD,

TESTIFIED ON DIRECT EXAMINATION BY MR. JETT AS FOLLOWS:

Q. Would you state your name, please?
A. Ve'Queshia Ashford,
Q. You have more than two names, don't you?
A. Yes, sir.
Q. What is your whole name?
A. Ve'Queshia Andrea Leketha Nicole Ashford.
Q. And what do you go by?
A. Queshia.
Q. Okay. Can you pull the mic a little bit closer to you? Thank you. How old are you, Queshia?
A. Sixteen.
[478] Q. Where do you live?
A. In Greenville, Texas.
Q. Who do you live there with?
A. My grandmother and my grandfather.
Q. And who else?

A. And my aunts and my sisters and brother.
Q. Okay, How many sisters do you have?
A. Two.
Q. What are their names and ages?
A. Joycelyn, she is 14, and Divinity, she is ten.
Q. And who else lives there?
A. My aunt.
Q. Who is that?
A. Alicia.
Q. Okay. And she has some children who live there?
A. Yes, sir.
Q. Are those the two little boys out in the hall?
A, She has a son and a daughter.
Q. Okay. Do you go to school?
A. Yes, sir.
Q. Where do you go to school?
A. Greenville High School.
Q. What grade are you in?
A. Eleventh.
Q. Are you involved in any school activities?
[479] A. I run track.
Q. What do you run?
A. 100, 200, sprints and jumps.
Q. Okay. Do you know this lady right back here?
A. Yes, sir.
Q. Who is that?
A. My mama.
Q. And when did you go to live with your grandmother?
A. In February of 2003.
Q. Okay. Before that time, had you always lived with your mom?
A. Yes, sir.
Q. Okay. Do you know—Can you tell the jury why you went to live with your grandmother?
A. Because my mama had to go serve her sentence.

Q. Now, at the time that your mom had to go serve her sentence, where were you living?

A. In Dallas.

Q. Can you tell—Do you remember the name of the apartments or the location?

A. Off Forest Lane.

Q. Is that on Forest Springs?

A. Uh-huh,

Q. And was that a two bedroom apartment?

A. Yes, sir.

[480] Q.Okay. Do you know a person by the name of Thomas Earl Wright?

A. Yes, sir.

Q. And does he have a nickname?

A. Yes, sir.

Q. And what is his nickname?

A. Pacman.

Q. And when did you meet him?

A. In August of 2002.

Q. Okay. Did he become your mom's boyfriend?

A. Yes, sir.

Q. Had she known him before and she just met him around that time?

A. Met him around that time.

Q. Can you tell the jury how they got along at first?

A. Fine.

Q. when they first met, where did you all live?

A. In Hyde Park.

Q. Do you know that address?

A. On Melody Lane.

Q. And is it near any larger streets that we might know of?

A. Skillman. It is like off Skillman.

Q. Skillman and Abrams?

A. Yes, sir.

Q. Did your mom and Pacman get along pretty good for a while?

[481] A. Yes, sir.

Q. Did that change?

A. Yes, sir.

Q. About how long after they started seeing each other did that change?

A. Not long; maybe a couple of weeks.

Q. And how did that relationship change?

A. He became abusive towards her.

Q. When you say "abusive," what do you mean?

A. He would hit her, and he would make her stay at home, and things like that,

Q. When you say "stay at home," how would he make her stay at home?

A. He would take her car where she wouldn't be able to leave.

Q. When he hit her, where did he hit her?

A. On her arms and her legs, and sometimes on her chest.

Q. Okay. Were these places where clothes would cover them up?

A. Yes, sir.

Q. Did they have argments?

A. Yes, sir.

Q. What did they have arguments about?

A. Little things. This is the smallest, like clothes she wore, or if she wanted to go somewhere.

Q. Did they have bigger arguments, too?

A. Yes, sir.

[482] Q. At some point did they break up?

A. Yes, sir.

Q. Do you remember about when that was?

A. Towards the end of November and beginning of December.

Q. And did they then get back together?

A. Yes, sir.

Q. Now, did he ever really quit coming around?

A. No, sir.

Q. In December did you all move?

A. Yes, sir.

Q. And where did you move to?

A. The apartments that we were staying in before we moved to Greenville.

Q. And what kind of apartment did you move into?

A. A two bedroom.

Q. What kind of apartment had you been living in before?

A. One bedroom.

Q. How did you all get moved?

A. They, Pacman, Hookie, and Derek moved us.

Q. Now, Pacman is Thomas Earl Wright. Who is Hookie?

A. Cory.

Q. Do you know his last name?

A. I don't know his last name.

Q. Does the name Cory Sanders ring a bell to you?

A. Yes, sir.

[483] Q. Okay. And who is the third guy?

A. Tyshon. Not Tyshon. Derek, I am sorry.

Q. And they helped you all move. Is that right?

A. Yes, sir.

Q. And after you all moved, did Pacman come to live with you?

A. Yes, sir.

Q. Was he there all the time?

A. Yes, sir.

Q. Did the arguments continue?

A. Yes, sir.

Q. Did they get better? Did they get worse?

A. Worse.

Q. How did they get worse?

A. He would—It would be instead of like actually having a reason to argue, it would be over little smaller things, like maybe something she cooked or something.

Q. Would there he any real reasons to argue?

A. No, sir.

Q. Would he hit her?

A. Yes, sir,

Q. Where would he hit her?

A. Same places--her arms, legs, chest.

Q. Did you see him hit her?

A, Yes, sir.

Q. Did she have the same bruises or did she get new bruises?

[484] A. New bruises.

Q. Now, after he moved in, was she free to go anywhere she wanted?

A. No, sir.

Q. why not?

A. He wouldn't let her leave.

Q. And how did he keep her at home?

A. He would take her car, or if he left in his car he would take her keys.

Q. Okay. What about money? Did Pacman over get money from your mom?

A. Yes, sir.

Q. Was this a regular thing or could you tell?

A. Regular.

Q. Did your mom appear to be scared of him?

A. Yes, sir.

Q. Okay. Let's talk about—Let's go to January of this year, and I want to ask you, do you remember there being talk about a gun show?

A. Yes, sir.

Q. And do you remember somebody coming home from a gun show?

A. Yes, sir.

Q. Were you there at the apartment during the day?

A. Yes, sir.

Q. And was anything brought home from the gun show?

[485] A. Yes, sir.

Q. What was brought home?

A. Hookie brought a gauge and Pacman had a Tec.

Q. What is the gauge? Do you know?

A. It is like a shotgun.

Q. And had you ever seen these guns before?

A. No, sir.

Q. Did your mom bring them in?

A. No, sir.

Q. Who did the guns belong to?

A. Pacman and Hookie.

Q. Now, did one of the—Did the Tec have a special characteristic?

A. Yes, sir.

Q. What was that?

A. A red laser.

Q. Let me show you something that the jury has seen, but ask you, did it kind of look like this?

A. Yes, sir.

Q. And what would he do with the gun and laser?

A. He would point it at people, and he would ask questions like, "What do you know about this red dot?"

Q. Who did he point it at?

A. He pointed it at my mom and my sister.

Q. Did your mom ever carry the gun around?

[486] A. No, sir.

Q. Did you ever see her with it?

A. No, sir.

Q. After this first gun show, did Pacman continue to hit your mom?

A. Yes, sir.

Q. Was she able to go places?

A. No, sir.

Q. Now, was Pacman nice to you?

A. No, sir.

Q. Did you hear about another gun show?

A. Yes, sir.

Q. Did you see evidence that somebody went to that gun show?

A. Yes, sir.

Q. What did you see?

A. A.D. had a gun, but I can't remember if anybody else had one.

Q. But you remember your mom going off somewhere a week later on the 11th?

A. Yes, sir.

Q. Were you and Joycelyn at home?

A. Yes, sir.

Q. Was anybody else with you?

A. A friend of mine.

Q. And when you—After the gun shows, did you all go to [487] church?

A. Yes, sir.

Q. Was that a regular thing that your family did?

A. It was kind of regular.

Q. After the gun shows, did somebody go with you all to church?

A. Yes, sir.

Q. Who was that?

A. Rookie.

Q. Now, this was on Sunday, I assume?

A. Yes, sir.

Q. So before January had Rookie ever gone to church with you all?

A. No, sir.

Q. Did Hookie appear to go for religious reasons?

A. No, sir.

Q. During the time your mom lived or Pacman was living there in late December and January, was your mom afraid of him?

A. Yes, sir.

Q. Were you afraid of him?

A. Yes, sir.

Q. Did you see your mom play with those guns?

A. No, sir.

Q. Did you see any evidence that they belonged to her?

A. No, sir.

[488] MR. JETT: Pass the witness,

THE COURT: Ms. Heath?

MS. HEATH: Yes, Your Honor.

CROSS EXAMINATION

By Ms. Heath:

Q. Hello, Ms. Ashford.

A. Hello.

Q. Do you remember me? My name is Candy Heath.

A. Yes, ma'am.

Q. Now, let's see. You mentioned you were 16. Is that correct?

A. Yes, ma'am.

Q. And your sister Joycelyn is 14, and your sister Divinity is ten?

A. Yes, ma'am.

Q. Divinity's father is Ted Dixon. Is that correct?

A. Yes, ma'am,

Q. And in fact, you and Joycelyn, and Divinity and your mom all lived with Ted Dixon for eight or nine years while they were married.

A. Yes, ma'am.

Q. And after the divorce, Ted would occasionally come by on weekends and take all of you out. Is that correct?

A. No.

Q. And in fact, on his visitation with Divinity there would [489] he occasion when Joycelyn would go with him and occasions when you would go.

A. Yes, ma'am,

Q. And sometimes—

MR. JETT: Excuse me, Judge. Rased on pretrial rulings, I am going to object to this, the discussion about Ted Dixon.

THE COURT: I am not sure where she is going. She hadn't gotten into the area we discussed, so go ahead, Overrule that objection.

MS. HEATH: Q. And there have been occasions when your mom has called upon Ted Dixon to help pick one of you up at school or take one of you to school on occasions when she was not able to do it in the past.

THE WITNESS: A. Yes, ma'am.

Q. And in fact, while your mom has been in jail, Ted Dixon has still continued to come to visitation to pick up Divinity. Isn't that correct?

A. Yes, ma'am.

Q. And it is almost every weekend.

A. Yes, ma'am.

Q. In fact, Ted Dixon will take your sister Divinity to the jail to visit your mom.

A. Yes, ma'am.

Q. Your mom is about 35 years old?

[490] A. Thirty-six.

Q. Thirty-six? And during the time that these guns were purchased in January, she was 35.

A. Yes, ma'am.

Q. Now, you mentioned Pacman. Did you know his real name initially, or did you always know him as Pacman?

A. As Pacman.

Q. And Pacman, when he first met your mom, was 20. Isn't that correct?

A. I don't know.

Q. Isn't he about 21 right now or so?

A. I don't know,

Q. And Cory, the person you called Hookie, isn't he about 24? He is in his early 20s as well?

A. Yes, ma'am.

Q. And Tyshon that you mentioned earlier, isn't he also in his early 20s?

A. Yes, ma'am.

Q. You mentioned that you are currently living with your grandma and your grandfather in Greenville.

A. Yes, ma'am.

Q. Your grandmother is Sheryl Jimmerson?

A. Yes, ma'am.

Q. And they have lived in Greenville for a long time, have they not?

[491] A. Yes, ma'am.

Q. And you have another grandpa that lives in Greenville also. Isn't that right?

A. Yes, ma'am.

Q. Is that because your grandmother remarried?

A. Yes, ma'am.

Q. And you have seen them on occasion over the past several years?

A. Yes, ma'am.

Q. In fact, your mom I believe graduated from Greenville High School?

A. Yes, ma'am.

Q. Is that the school you are going to right now?

A. Yes, ma'am.

Q. Now, the whole time that your mom has known Pacman, has she actually been dating him as her boyfriend or have there been other people?

A. Him only.

Q. It is only him?

A. Yes, ma'am.

Q. And prior to Pacman, or between the marriage of Ted Dixon and Pacman, there have been other boyfriends?

A. Yes, ma'am.

Q. And in fact, your father is Harold Humphrey. Is that correct?

[492] A. Yes, ma'am.

Q. And your sister Joycelyn's father is Sedrick Dixon?

A. Yes, ma'am.

Q. And Sidrick Dixon is not related in any way to Ted Dixon?

A. No, ma'am.

Q. Just a coincidence that their last names arc Dixon?

A. Yes, ma'am.

Q. The apartment that you lived in on Melody Lane, did you initially move there with your mom and anybody else?

A. No.

Q. Did an individual by the name of Tabyrai Sweat or nicknamed Tiger ever live there?

MR. JETT: Excuse me, Judge. I am going to object. This is not relevant.

THE COURT: Overrule the objection_ Go ahead.

MS. HEATH: Q. Prior to the Melody Lane address, did you live with a Tiger and his mother Beverly on Abrams?

THE WITNESS: A. We lived with Tyke on Skillman and Kingsley.

Q. Skillman and Kingsley?

A. Yes, ma'am.

Q. Did his mother live there also, Beverly Sweat?

A. She came to stay after she had a conflict in her apartments.

Q. And approximately how old is Beverly?

[493] A. I don't know.

Q. The two bedroom apartment you moved into in Forest Springs, one bedroom was your mother's and one bedroom the three girls shared. Is that correct?

A. Yes, ma'am.

Q. And Pacman would come and go. He was not there on a regular basis?

A. He was there on a regular basis depending on—

Q. I am sorry. Go ahead.

A. Depending on—Sometimes ho would be there on a regular basis and sometimes he would just come and go.

Q. But he didn't keep all his clothes there, He had another location.

A. Yes, ma'am.

Q. En fact, he had a location on Peavy goad. Is that correct? On Peavy, is that—Where did his children live?

A. I am not for sure.

Q. Now, for the apartment on Forest Springs, your mother had a key to the apartment. Isn't that correct?

A. Yes, ma'am,

Q. And she gave a key to the apartment to Pacman?

A. Yes, ma'am.

Q. She never got that key back from Pacman, as far as you know?

A. No.

[494] Q. Did you and your sisters have a key to the apartment?

A. No, ma'am.

Q. While you were living or prior to your living on Forest Springs when you were living on Melody Lane, you enrolled in Bryan Adams High School?

A. Yes, ma'am.

Q. And Pacman was your emergency contact at that school. Isn't that correct?

A. Yes, ma'am.

Q. And then after the Bryan Adams High School, you left there in December of 2002.

A. Yes, ma'am.

Q. And in January 2003 you enrolled at Lake Highlands High School?

A. Yes, ma'am.

Q. And Pacman was still your emergency contact for that location?

A. Yes, ma'am.

Q. Now, to get to school, your mom would drive you to school.

A. No, ma'am.

Q. And drive your sisters to school?

A. No, ma'am.

Q. How did you get to school?

A. I rode the bus and I walked. My baby sister got to school because Z walked her, and my other sister walked to school.

[495] Q. Weren't there some occasions when going to Bryan Adams that Ted Dixon would either come and pick you up or drop you off at school?

A. No, ma'am.

Q. You mentioned that you heard about the first gun show at Market Hall, or the first gun show that everybody went to, and you know your mom went to the gun show?

A. Yes, ma'am.

Q. And you know that Pacman went to the gun show?

A. Yes, ma'am.

Q. You know that Pacman's sister went to the gun show?

A. Yes, ma'am.

Q. And you know that Rookie went to the gun show?

A. Yes, ma'am.

Q. And in fact, your mom and Pacman's sister went in one car?

A. I don't know how they got there.

Q. And Pacman and Hookie went in another car.

MR. JETT: Excuse me, Judge. She is making a statement about things that aren't in evidence.

THE COURT: She may ask. She may ask if she knows.

MR. JETT: It didn't sound like a question. it sounded more like a statement.

THE COURT: Overruled. It is a question.

MS. HEATH: Q. Did you know that they went in separate cars to the gun show?

[496] THE WITNESS: A. No, ma'am.

Q. And when they came back from the gun show, your mom came back alone first in her oar?

A. Yes, ma'am,

Q. And that was prior to Pacman and Hookie arriving.

A. Yes, ma'am.

Q. And on that occasion you are at home?

A. Yes, ma'am,

Q. When your mom arrives?

A. Yes, ma'am.Q

Q. Are your sisters there with you?

A. Yes, ma'am.

Q. Do you have any friends there or your sister's friends there?

A. No, ma'am.

Q. Anybody else there at the apartment?

A. No, ma'am.

Q. So it is just the four of you at the apartment?

A. Yes, ma'am.

Q. And everybody waits, and ultimately Pacman arrives.

A. No, ma'am. Farrah had came because we were supposed to be having a get-together that day.

Q. That is Farrah Pooler?

A. Yes, ma'am,

Q. That is Pacman's sister?

[497] A. Yes, ma'am.

Q. So she came to the house also?

A. Yes, ma'am. And Farrah got into an argument with T.K., and so she called Pacman and then Pacman came.

Q. And do you know T.K.'s real name?

A. No, ma'am.

Q. And T.K. is also in his early 20s. Is that correct?

A. I am not for sure.

Q. Now, when everybody arrived, at some point you saw guns on that occasion.

A. Yes, ma'am.

Q. And which guns did you see during that occasion?

A. The gauge, and then I saw the box that Pacman kept his gun in, he kept his Tec in.

Q. What kind of box was that?

A. A black box.

Q. Like a hard plastic box?

A. Yes, ma'am.

Q. I am going to hold up Government's Exhibit No. 37. Did it look like this box?

A. Yes, ma'am.

Q. And so this was in your apartment, which was on Forest Springs where you lived with your mom?

A. Yes, ma'am.

Q. And he was taking the gun out and playing with it?

[498] A. Yes, ma'am.

Q. And there was also a shotgun?

A. Yes, ma'am.

Q. And were there some shotgun shells for it?

A. Yes, ma'am.

Q. Do you know who bought the shotgun shells?

A. No, ma'am.

Q. Did you see anybody loading the Tec, the gun that came out of Government's Exhibit No. 37?

A. No, ma'am.

Q. Now, during that week you are on vacation from school? Was that a holiday from school that week?

A. The week before the first gun show?

Q. The week before the first gun show.

A. Yes, ma'am.

Q. But after the first gun show did you go back to school?

A. Yes, ma'am.

Q. So you have to go back to school on a regular basis; it starts back up?

A. Yes, ma'am.

Q. And that is Lake Highlands at this time?

A. Yes, ma'am.

Q. And your sisters are both going to school?

A. Yes, ma'am.

Q. Either at Bryan Adams or at Lake Highlands, you never tell [499] any of your teachers that there is problems at home.

A. No.

Q. You never tell any of your counselors at school that there is problems at home?

A. No, ma'am.

Q. During December of 2002 and January of 2003, you don't tell your grandmother or either of your grandfathers that there are any problems at home?

A. No, ma'am.

Q. And to your knowledge your mom isn't telling anybody?

A. No, ma'am.

Q. And Ted Dixon is still having visitation with at least Divinity at this time?

A. Yes, ma'am.

Q. And nobody is telling Ted Dixon there is problems at home?

A. No, ma'am.

Q. During the week between the two gun shows, you and your mother and your other sisters didn't make any effort to move out of the apartment, did you?

A. No, ma'am.

Q. You didn't go to the apartment manager and say, "We need to change the locks on our apartment"?

A. No, ma'am; not to my knowledge.

Q. Or you never went to the apartment manager to say, "We need to move to a new apartment"?

[500] A. No.

Q. Your mom never grabbed you all and jumped in the car and said, "We have got to get out of here"?

A. No.

Q. Go to grandma's or grandpa's or Ted Dixon?

A. No.

Q. Or Beverly Sweat?

A. No, ma'am.

Q. You talked about knowing that there was a second gun show that everybody went to.

A. Yes, ma'am.

Q. And your morn went to that gun show?

A. Yes, ma'am.

Q. Pacman goes to that gun show?

A. Yes, ma'am.

Q. Hookie goes to that gun show?

A. No, ma'am.

Q. A.D. goes to that gun show?

A. No, ma'am.

Q. And do you know A.D.'s real name?

A. Roderick.

Q. Roger what?

A. Roderick. T don't know his last name.

Q. Roderick?

A. Yes, ma'am.

[501] Q. And did you date Roderick for a while?

A. Yes, ma'am.

Q. And he is your boyfriend, or he was your boyfriend at the time?

A. Yes, ma'am.

Q. So your boyfriend goes with Pacman and with—And how old is Roderick?

A. Nineteen.

Q. And you don't know Roderick's last name?

A. No, ma'am.

Q. Do you know where Roderick lives?

A. Just I know he was staying in an apartment on Kinglsey?

Q. Do you remember talking to me before in March of this year, 2003?

A. Yes, ma'am.

Q. And do you remember not knowing A.D.'s name at that time?

A. Yes, ma'am.

Q. Did you know A.D.'s name then?

A. No, ma'am.

Q. You just learned what his name was recently?

A. Yes, ma'am.

Q. Now, when everybody comes back from the second gun show, what guns do you see?

A. I know A. D. had one, and I know that there was two black guns but I can't remember if they came from the first or the [502] second.

Q. Do you know what kind of black gun A.D. had?

A. His was silver.

Q. And how was it shaped?

A. It was like a handgun, but it was a little bigger.

Q. If we can show Government Exhibit No. 52 on the screen. Did it look sort of like that?

A. Yes, ma'am.

Q. And that was A.D.'s gun?

A. Yes, ma'am.

Q. In fact, A.D. kept that gun with him, didn't he? I mean, he left the apartment with it. He didn't leave it there at the apartment.

A. Yes, ma'am.

Q. You mentioned that you saw some other guns, but you weren't sure whether they came from the first gun show or not?

A. Yes, ma'am.

Q. which guns were those or what did they look like?

A. They were black handguns.

Q. clack handguns?
A. Yes, ma'am.
Q. And how many of them were there?
A. Two.
Q. Did they look the same?
A. Yes, ma'am.
[503] Q. Let me show you Government's Exhibit No. 50 on the screen. Did they look like that gun?
A. Yes, ma'am.
Q. And there were two of them that you saw?
A. Yes, ma'am.
Q. And this was after the second gun show?
A. I can't remember if it was after the first or the second.
Q. Now, some of the—You had quite a few people or young men that hung out at your apartment. Isn't that right?
A. Yes, ma'am.
Q. You have Pacman?
A. Yes, ma'am.
Q. Hookie?
A. Yes' ma'am.
Q. Tyshon, he goes by Little Ty. Is that correct?
A, I just know him as Tyshon.
Q. Tyshon? A.D.
A. Yes, ma'am.
Q. A person named Casper?
A. Casper?
Q. Casper.
A. Yes, ma'am.
Q. Capone?
A. Yes, ma'am.
Q. Little Half?
[504] A. Yes, ma'am.
Q. E?
A. Yes, ma'am.
Q. And K.T. You mentioned K.T.
A. T.K.

Q. T.K. I am sorry. And all of these people would mill around outside and sometimes be in the apartment?

A. Yes, ma'am.

Q. And they may be meeting other friends that would drive up to the apartment; people that you may not know?

A. Yes, ma'am.

Q. During the time that the guns were purchased at the gun show, do you recall your mom having an argument with Hookie with Cory Sanders and calling the police?

A. No, ma'am.

Q. And when the police arrived, A.D. had to run out of the apartment. Do you remember that incident?

A. Yes, ma'am. He was with T.K.

Q. T.K. So your mom had an argument with T.K.?

A. Yes, ma'am.

Q. And your mom called the police?

A. Yes, ma'am.

Q. And the police arrived at her apartment?

A. Yes, ma'am.

Q. And A.D., who had his nine millimeter gun, ran out of the [505] apartment?

A. Yes, ma'am. Re was already gone when the police got there.

Q. And he had to throw his gun over the fence.

A. Yes, ma'am.

Q. And the other guys were talking about going and getting the gun before A.D. got back?

A. Yes, ma'am.

Q. But A.D. went and got his gun before they got back?

A. Yes, ma'am.

Q. The police came and went. Did anybody go to jail?

A. No, ma'am,

Q. Did your mom report the fact that she is being abused by all these people?

A. No, ma'am.

Q. Did you report the fact that your mom was being abused?

A. No, ma'am,

Q. Did anybody report any sort of threats that are going on?

A. No, ma'am.

Q. Did anybody say, "I have been forced to buy these guns at the gun show"?

A. No,

Q. Any of that?

A. No.

Q. Remember the day your mom was sentenced?

A. Yes, ma'am.

[506] Q. In fact, that was the Wednesday following that last gun show.

A. Yes, ma'am.

Q. So the gun show was on January 11th, 2003, and your mom came to this building to be sentenced.

A. Yes, ma'am.

Q. And that was January 15th, 2003?

A. Yes, ma'am.

Q. You were here?

A. Yes, ma'am.

Q. Your grandmother was here?

A. Yes, ma'am.

Q. Ted Dixon was here?

A. Yes, ma'am.

Q. At some point Pacman even showed up because he needed to pick up the car and take it back to pick up your sisters.

A. Yes, ma'am.

Q. Because they needed to be picked up from school?

A. He was in the car.

Q. But he had to come up and get a house key because for some reason he didn't have a key?

A. No.

Q. So he had your mom's car at that time?

A. Yes, ma'am.

Q. But he came up to the court for a short period of time?

[507] A. Yes, ma'am.

Q. That was a lengthy hearing that was had that day, wasn't it?

A. Yes, ma'am.

Q. At any time in that hearing did anybody tell the Judge, "Judge, we are being abused; we are being threatened"?

A. No, ma'am.

Q. Did anybody tell the Judge, "We have been forced to buy guns at gun shows"?

A. No, ma'am.

Q. Your mom had to meet on a regular basis with a Pretrial Services officer while she was on bond for the offense.

A. Yes, ma'am.

Q. Did you ever contact the Pretrial Services officer who works for the courts to say, "We are being abused; we are being forced to buy guns"?

A. No.

Q. To your knowledge did your mom ever do that?

A. No, ma'am.

Q. She had to meet with him on a monthly basis, didn't she?

A. Yes, ma'am.

Q. And some of those meetings were here in this building?

A. Yes, ma'am.

Q. Did you come with her on Occasion?

A. Yes, ma'am.

[508] Q. In the past your mom has gone to the court to get a restraining order in situations where she felt threatened. Isn't that correct?

MR. JETT: Excuse me, Judge. Can I approach the bench?

THE COURT: Yes, sir.

(The following was had outside the presence and hearing of the jury)

MR. JETT: Judge, this goes to the Ted Dixon stuff you wouldn't let me go into.

THE COURT: I don't know what it goes to.

MR. JETT: That is what it is, I am telling you.

MS. HEATH: I am going to the fact she knows how to get a restraining order. I am not going into the detail of what the problem is; just that she knows how to get a restraining order.

MR. JETT: That opens up going into Ted Dixon and being abused. She brought up and tried to make the point that Ted was somebody they could rely on, and I think I get to go into the fact he was abusive, too.

THE COURT: Well, when we get to that point we can certainly discuss it. It may be that you have opened the door. We will deal with it there. Let's see.

MR. JETT: For the record, based on the Court's prior ruling, since I was prohibited from going into the matters [509] about Ted Dixon and his abuse, I object to her asking questions about Ted Dixon and those issues that relate to the abuse.

THE COURT: She hadn't mentioned Ted Dixon. She asked if she knew about the restraining order.

MR. JETT: The restraining order—

THE COURT: Counsel, I don't want to argue. We will deal with that later. Overrule the objection.

The following was had in the presence and hearing of the jury.

MS. HEATH: Q. Ms. Ashford, you know in the past that your mother has gotten a restraining order.

THE WITNESS: A. I don't know about it.

Q. You were not with your mom at either one of the gun shows?

A. No, ma'am,

Q. And neither were either of your sisters?

A. No, ma'am.

Q. Your grandmother was not there at the gun show?

A. No, ma'am.

Q. The nine millimeter gun, the gun that was shown on the screen earlier that was in A.D.'s possession, A.D. didn't buy that gun for himself, did he?

A. I don't know the story on it.

Q. So you don't know who actually bought the gun for him?

A. No, ma'am.

MS. MEATH: Your Honor, I will pass the witness.

[510] THE COURT: Mr. Jett?

MR. JETT: Could I approach the bench?

THE COURT: Yes, sir.

(The following was had outside the presence and hearing of the jury)

MR. JETT: Can I ask about Ted Dixon now? I think she opened—I mean, she made a point that they could call on Ted. There is a reason why she wouldn't.

THE COURT: I will let you ask about why they didn't, because you did bring up that. So I will let you ask her why they didn't call, and then take it from there,

MR. JETT: The other thing, Doctor Myers is in the hall. I forgot to bring her in for this witness. I would like to bring

her in. I don't think my redirect will be long, or recross isn't long. Can we bring her in with the next witness?

THE COURT: Sure. Okay. That will be fine,

(The following was had in the presence and hearing of the jury)

REDIRECT EXAMINATION

By Mr. Jett:

Q. Queshia, was there a reason why you all didn't call on Ted Dixon to help you?

A. He wasn't really a reliable person.

Q. Okay. Did you have any experiences with Ted Dixon in the past that caused you not to want to call on him?

[511] A. Yes, sir.

Q. And what were those experiences?

A. He was abusive to my mom and me and my sister.

Q. When you say "abusive," what did he used to do?

A. He used to beat us, all three.

Q. He used to heat your mom?

A. Yes, sir,

Q. And he used to beat your sister?

A. Yes, sir.

Q. And this was Joycelyn?

A. Yes, sir.

Q. And he used to beat you?

A. Yes, sir.

Q. Did that go on a short time or a long time?

A. Long time.

Q. Was that why they got divorced?

A. Yes, sir.

Q. Let me ask you this. were you afraid of these guys and these guns?

A. Yes, sir.

Q. Did that have something to do with why you didn't talk to other people?

A. Yes, sir.

MR. JETT: Pass the witness.

THE COURT: Ms. Heath?

[512] MS. HEATH: No further questions, Your Honor.

THE COURT: Ms. Ashford, you may step down. Thank you. Next witness?

MR. JETT: Call Joycelyn Dixon. May I get her, Your Honor?

THE COURT: Yes, sir.

(Whereupon, the oath was administered by the Court)

JOYCELYN DIXON,

TESTIFIED ON DIRECT EXAMINATION BY MR. JETT AS FOLLOWS:

Q. Would you state your name, please?
A. Joycelyn Sherrell (phonetic) Dixon.
Q. Can you lean up and try to talk into that microphone?
A. Joycelyn Sherrell Dixon.
Q. Okay. And Joycelyn, how old are you?
A. Fourteen.
Q. Where do you live?
A. 8404 Charles in Greenville, Texas.
Q. Who do you live with?
A. My grandma.
Q. And who else lives there?
A. My grandpa and my auntie and my two sisters.
Q. Okay. Do you go to school?
A. Yes.
Q. And what grade are you in?
A. The ninth.
[513] Q. Are you in any activities in school?
A. No.

Q. Okay. What do you want to be when you grow up?

A. A lawyer.

Q. Do you know this lady Tight back here?

A. Yes.

Q. Who is that?

A. My mother.

Q. And before you went to live with your grandmother, did you always live with your morn?

A. Yes.

Q. Have you lived with her all your life until recently?

A. Yes.

Q. What happened that caused you to live with your grandmother?

A. My mama went to jail.

Q. Where were you all living at the time she went to jail?

A. In north Dallas on Forest Springs Road, I believe.

Q. And before that where did you live?

A. In Hyde Park on Melody Lane.

Q. When you were living in Hyde Park on Melody Lane, did you come to know somebody by the name Of Thomas Earl Wright?

A. It is Thomas Earl Wright, Jr.

Q. And you might be a good lawyer, Does he have a nickname?

A. Pacman.

[514] Q. Okay. When did he start coming around?

A. He started coming around in August.

Q. Of what year?

A. Of 20G2.

Q. And when he first started coming around, what did you think of him?

A. He was nice at first.

Q. Was he nice to you and your sisters?

A. Yes.

Q. Was he nice to your mom?

A. At first.

Q. Okay. Did they get along well at first?

A. Yes, at first.

Q. Did that change?

A. Yes.

Q. When did it change?

A. I would say like around October.

Q. Okay. And how did it change?

A. He started hitting on my mother.

Q. Was there arguments that went along with that?

A. Yes.

Q. How often would he hit her?

A. It seemed like every day.

Q. Would there be any evidence that he was hitting her?

A. She had bruises on her chest and on her arms.

[515] Q. At this time how did he treat you and Ve'Queshia?

A. He still treated us nice.

Q. Okay. During this time, let's say October or so, was he living there or just coming around a lot?

A. I can't remember,

Q. At this particular time was your mom scared of him?

A. Yes.

Q. Okay. But did they break up?

A. Yes.

Q. Okay. And did he ever really completely go away?

A. No. He just kind of left and then he came back for a couple of days, and then he would leave again and then he would come back.

Q. But at some point did he—Let me ask you this. At some point did you all move or change apartments?

A. Yes.

Q. And when was that?

A. In December.

Q. Is that when you moved to Forest Springs?

A. Yes.

Q. When you all moved, how did you all get moved to that apartment?

A. Pacman helped us move.

Q. And after you all moved in there, did Pacman begin living there full time?

[516] A. Yes.

Q. And when he started living there, how did he and your mom get along?

A. They still argued a lot.

Q. Was there still hitting going on?

A. He still hit her.

Q. Did she still have bruises?

A. Yes.

Q. Was she scared of him?

A. Yes.

Q. Did she lose her job sometime in here?

A. Yes.

Q. When was the—Well, through December did the hitting continue?

A. Yes.

Q. Was—What would they argue about?

A. Everything.

Q. Was your mom able to come and go as she pleased?

A. No.

Q. And how was that?

A. If she did leave, one of his friends always left with her. She couldn't ever go anywhere by herself.

Q. When was the first time you saw guns in your house?

A. Around January.

Q. Do you remember talk about a gun show?

[517] A. Yes.

Q. The day your mom went to the gun show, where were you?

A. I believe I was at home.

Q. And did somebody return with some guns?

A. Yes.

Q. Who was that?

A. Pacman and Rookie.

Q. What kind of—Do you remember what kind of guns they were?

A. It was one gun with a red laser on the front of it and two guns that looked just alike.

Q. The red laser, did it have a dot like that?

A. Yes.

Q. Who did the guns belong to?

A. Pacman and Rookie.

Q. Did they belong to your mom?

A. No.

Q. Did she ever get them out and play with them?

A. No.

Q. Did Pacman ever point guns at anybody?

A. Yes.

Q. And who did he point guns at?

A. He pointed one at my mama and then he pointed one at me.

Q. Okay. And which gun did he point at you?

A. The one with the red dot on the end of it.

[518] Q. Where did he point it?

A. At my forehead.

Q. And where did he point it at your mom?

A. I can't remember exactly where it was.

Q. I mean, was it on her arm or leg?

A. It was on her face.

Q. It was on her face. It was it something like this?

A. Yes.

Q. How many times did he do that?

A. I can only recall once.

Q. What did he say when he would point the gun at somebody with the red dot?

A. "What do you know"—

MS. HEATH: Objection, Your Honor hearsay.

THE COURT: Overrule the objection. You may answer.

MR. JETT: Q. You can answer the question.

THE WITNESS: A. "What do you know about that red dot?"

Q. What did you know about the red dot?

A. Nothing.

Q. When he pointed the red dot at you, was he pointing the gun at you?

A. Yes.

Q. After this first gun show, did the arguments continue?

A. Yes.

[519] Q. Did the hitting continue?

A. Yes.

Q. Did your mom continue to have bruises?

A. Yes.

Q. Old bruises or new bruises?

A. Old and new.

Q. After this first gun show, were there any limitations on where your mom could go?

A. Yes.

Q What were the limitations?

A. She could only go to the store and back.

Q. Could she go by herself?

A. No. She always had one of his friends with her, and when she went to church she had his friend with her.

Q. Do you recall a second gun show?

A. No.

Q. Do you recall the hitting continuing through January?

A. Yes.

Q. After this first gun show, did you continue to see guns around the house?

A. Yes.

Q. Did they continue to have arguments?

A. Yes.

Q. Did she continue to get beat on through January?

A. Yes.

[520] Q. Was your mom scared of Pacman?

A. Yes.

Q. How about you? Were you scared of him?

A. Yes.

Q. You were talking about church. After the gun shows, was that when somebody went to church with you all?

A. Yes.

Q. Who was that?

A. Pacman's friend Hookie.

Q. Did Hookie have guns, too?

A. Yes.

Q. Do you remember Hookie' s name?

A. Cory Sanders.

Q. Thank you.

MR. JETT: Pass the witness.

THE COURT: Ms. Heath?

MS. HEATH: Yes, Your Honor.

CROSS EXAMINATION

By Ms. Heath:

Q. Ms. Dixon, my name is Candy Heath. How are you doing?

A. Fine.

Q. You are currently going to school in Greenville?

A. Yes.

Q. In January of 2003, what school were you going to?

A. January I was going to Forest Meadows Middle School.

[521] Q. And you had good attendance?

A. Yes.

Q. And in December of 2002, were you still going to the same school or was it a different school? A. You mean before we moved?

Q. Before you moved to Forest Springs.

A. Before we moved to Forest Springs I was going to I believe it was Lake Highlands Middle School.

Q. And you had good attendance there, too?

A. Yes.

Q. Didn't miss a lot of school and weren't sick a lot?

A. No.

Q. Prior to Pacman living with you on and off, you and your sisters and your mom lived with an individual by the name of Tabyrai Sweat?

A. Tabyrai Sweat.

Q. And his mom Beverly moved in at some point?

A. Yes.

Q. And you lived with them for a while?

A. Yes.

Q. And then there was an argument or some reason why your mom broke up with him?

A. Yes.

Q. Your mom left him?

A. Yes.

[522] Q. Moved in to a new apartment?

A. Yes.

Q. Took you and your sisters with her?

A. Yes.

Q. And in the Forest Springs apartment did you just have one apartment there or were there two different apartments?

A. We just had one apartment.

Q. And it had two bedrooms?

A. Yes.

Q. You and your sisters shared one bedroom?

A. Yes.

Q. And your mom had another bedroom?

A. Yes.

Q. And Pacman was there sometimes, but sometimes he was there and would spend the night sometimes?

A. True.

Q. And he had another place where he would stay?

A. Yes.

Q. Your mom is about 35 or 36 years old?

A. Yes.

Q. And at the time of the gun shows she was 35 years old?

A. Yes.

Q. Pacman was about 21 at the time?

A. I am not sure how old he was.

Q. Early 20s?

[523] A. Probably. I would say so.

Q. And his friend Hooke is also in his early 20s?

A. I am not sure.

Q. About the same age as Pacman?

A. I don't know.

Q. There are other people that came and went from your apartment. Isn't that right? Other young males?

A. Yes.

Q. In fact, your sister had a boyfriend A.D.?

A. Yes.

Q. And she went out with him for a while?

A. Yes.

Q. And he would come and go?

A. Yes.

Q. He became pretty good friends with Pacman?

A. They talked, but I don't know if they were friends or not.

Q. You had another person by the nickname of E that came by the apartment?

A. Yes.

Q. A guy with the nickname Little Half came by the apartment?

A. Yes.

Q. These people come and go. They are not staying there.

A. No.

Q. They are just visiting?

A. Yes.

[524] Q. Tyshon Hillary?

A. Yes.

Q. A person by the nickname Capone?

A. Yes.

Q. A person by the nickname of Casper?

A. I don't recall Casper coming over there.

Q. And T.K.

A. Yes.

Q. In fact, during the gun show, your mom had an argument with T.K., didn't she?

A. Yes.

Q. And she called the police on him she was so mad?

A. Yes.

Q. And do you remember during that time when the police came to the apartment?

A. I wasn't there. I was at church with my grandmother.

Q. So you were gone from the apartment?

A. Yes.

Q. You were with your grandmother. But you heard about the police coming to the house?

A. Yes.

Q. Was Divinity with you?

A. Yes.

Q. And your grandma, your grandmother and your grandfather both wanted to see you on a regular basis. They wanted to come [525] visit with you or go to church with you?

A. My auntie used to come get us and take us to church.

Q. Would that be on a regular day of the week, would that he on Sunday, or another day during the week?

A. Just Sundays or Saturdays. Sometimes she get us Friday night and we would spend the weekend with her.

Q. That is in Greenville?

A. No. My aunt stays in Dallas and we go to church in Dallas.

MR. JETT: It we are talking about this, can we have a time frame we are talking about?

THE COURT: Ms. Heath?

MS. HEATH: Q. Was this during the Lime you lived on Melody Lane and during the time you lived on Forest Springs?

THE WITNESS: A. Forest Springs.

Q. So this is while you lived in the two bedroom apartment with Pacman?

A. Yes.

Q. Now, you mentioned that Pacman had this gun with a red dot?

A. Yes.

Q. And he was pointing it around on people, and he thinks it is real funny.

A. Yes.

Q. He is making it hit on somebody's head or chest?

A. Yes.

[526] Q. He is doing it to everybody in the apartment?

A. Not everybody. He just did it to my mother and he did it once to me.

Q. Just once to you?

A. Yes.

Q. And once to your mom?

A. I am not sure how many times he did it to my mother, but I can only recall once.

Q. And your mom is telling him to stop doing that?

A. Yes.

Q. Now, during the time that you were living in either Melody Lane or Forest Springs when Pacman could come and go from your apartment, did he have a key to your apartment?

A. I am not sure if he did or didn't.

Q. Your mom had a key?

A. Yes.

Q. Did you have a key?

A. No.

Q. So you needed to make sure or somebody needed to be home when you got home from school to let you in?

A. I was picked up from school.

Q. Would your mom pick you up from school?

A. No. Yes, she did.

Q. And on occasion Ted Dixon would pick you up from school?

A. Yes. If my mother couldn't make it home from work in time [527] then Ted would pick us up.

Q. So she relied on Ted occasionally to pick you and your sisters up from school?

A. Yes.

Q. Now, Ted Dixon had regular visitation with Divinity, and sometimes you and Ve'Queshia would go with him?

A. Yes.

Q. And you would go out and spend the weekend with him?

A. We didn't spend a weekend. We spent a day or so.

Q. Okay. And you go out and eat some place or go hang out?

A. He would take us but he wouldn't take us out to eat.

Q. And since you moved to Greenville, Divinity has seen Ted Dixon more than you and your sister Ve'Queshia?

A. Yes.

Q. But she has seen him still on a regular basis?

A. Yes.

Q. Now, you mentioned or Mr. Jett asked you several times were you afraid of Pacman.

A. Yes.

Q. You weren't afraid of Pacman everyday, were you?

A. Not at first I wasn't. I wasn't afraid of him until he started hitting on my mother.

Q. And during the time that he is hitting on your mother, that makes you afraid of him?

A. Yes; because of previous experiences.

[528] Q. As you are going to school during this period of time, you are not telling your teachers about it, are you?

A. No.

Q. And you are not telling your counselors about it?

A. No.

Q. And sometimes there is even a security officer or police officer at the school, isn't there?

A. Yes.

Q. And you didn't tell him about it?

A. No.

Q. You didn't tell your grandmother about it?

A. No.

Q. Didn't tell your aunt about it?

A. No.

Q. Didn't tell Ted Dixon about it?

A. No.

Q. Didn't tell either of your grandpas about it?

A. No.

Q. Did you go to the apartment complex and report it to the security people at the apartment complex?

A. No.

Q. Did you report it to the apartment manager and say, "We need to change our locks. We need to get him out of here"?

A. No.

Q. Did you call the police?

[529] A. No.

Q. To your knowledge, did your mom ever call the police on Pacman?

A. Not that I know of.

Q. Now, you came with your mom to this building on occasion when she visited her Pretrial Services officer?

A. Uh-huh.

Q. His name—Is that a yes?

A. Yes.

Q. His name was Louie Rodriguez?

A. Yes.

Q. And those meetings were about once a month?

A. Yes.

Q. And he had to verify where she was living and all that information?

A. Yes.

Q. Verify that she was still working somewhere, if she was?

A. Yes.

Q. At any time during those meetings did you or your mom report the fact that she is being abused?

A. No.

Q. Did she ever report the fact that she has been required to buy guns?

A. Not when I was with her, because I only went with her twice.

[530] Q. And when you would go with her, would Divinity go?

A. No.

Q. Did Ve'Queshia go?

A. She went with her once, but I wasn't with them when she went with her.

Q. Anybody else go?

A. Not that I know of.

Q. Was this in your mom's car?

A. Yes.

Q. Did you—Other than the gun with the laser dot, did you see other guns at the apartment?

A. Yes.

Q. Which other guns did you see?

A. There were two guns that looked just alike that Pacman and Hookie used to call their twins.

Q. Okay. If we could show Government's Exhibit No. 50 on the screen, does this look like the twins?

A. Yes.

Q. So Government's Exhibit No. 50 looks like the two guns that Pacman and Hookie had?

A. Yes.

Q. Did you see A.D. with a gun?

A. Not that I can recall.

Q. Your mom had another friend I believe by the name of Greg?

A. Yes.

[531] Q. Did she ever tell Greg that she was having problems?

A. Not that I know of.

Q. Do you know if—Were you ever present when she told Ted Dixon she was having problems and needed to get out of the situation's

A. No.

Q. At any point did your mom say that, you know, "Girls, get ready. We need to pack up all our belongings and move out of here"?

A. No.

Q. Do you know A.D.'s real name?

A. No.

Q. Just know him by nickname?

A. Yes.

Q. Do you know what school he went to?

A. No.

Q. And was he about 18 or so?

A. I don't know.

Q. But A.D. wasn't originally one of Pacman's friends.

A. No.

Q. A.D. was your sister Ve'Queehia's friend?

A. Yes.

Q. And A.D. sort of scared your too, didn't he?

A. No.

O. He didn't scare you?

[532] A. No.

MS. HEATH Your Honor, we will pass the witness.

THE COURT: Mr. Jett?

REDIRECT EXAMINATION

By Mr. Jett:

Q. Joycelyn, is there a reason why you all couldn't call on Ted and ask for his help?

A. Because he used to hit on my mother, too.

Q. Did he hit on you?

A. Yes, and my alder sister Ve'Queshia.

Q. Did he ever hit on the little one, Divinity?

A. No.

Q. Divinity was his daughter. Is that right?

A. Yes.

Q. But you are not?

A. No.

Q. And neither is Ve'Queshia?

A. No.

Q. How long did you all live with Ted Dixon?

A. Until I was—I believe I was 13.

Q. And about how old were you when your morn married him? Do you recall?

A. No.

Q. Would it be as much as eight or nine years that you lived with him?

[533] A. I think so.

Q. And when you say he hit on your mom, was this an infrequent or a frequent thing?

A. Frequent.

Q. When he hit on you and Ve'Queshia, was it frequent or—

A. Frequent.

Q. Do you feel safe being around Ted?

A. No.

Q. Did you want to spend time with him?

A. No.

Q. Did he ever hit on Divinity?

A. No.

Q. These other guys like Greg and T.K. and any of them of those guys, were they friends of Pacman?

A. Yes.

Q. Would it have done any good to talk to them about what was going on?

A. No.

Q. Were they aware of it?

A. Yes.

Q. Did they offer to help anybody?

A. No.

Q. Were they going along with it?

A. Yes.

Q. Why didn't you tell your Teachers and other folks?

[534] A. I don't know.

Q. Were you scared?

A. Yes.

Q. Did you feel embarrassed about what was going on?

A. Yes.

MS. HEATH: We object to the constant leading.

THE COURT: Sustained.

MR. JETT: Q. Any other reasons why you didn't tell them?

THE WITNESS: A. None except for that I was scared, and like my mother was with Pacman, the relationship was unpredictable, and you never knew what was going to happen next.

Q. Whose well-being were you concerned about?

A. Mine and my sisters and my mother's.

MR. JETT: Pass the witness.

THE COURT: Ms. Heath, any other questions?

MS. HEATH: No further questions, Your Honor.

THE COURT; Ms. Dixon, you may step down. Thank you. You are free to go.

MR. JETT: May we approach, Your Honor?

THE COURT: Yes, come on up.

(The following was had outside the presence and hearing of the jury)

MR. JETT: I am not resting. You looked at me.

A. Correct. If I had known anything, I would have asked questions

* * * *

[549] THE COURT: Right, That issue has been properly raised, and we will deal with that when we get to Doctor Myers. Are you ready to proceed, then?

MR. JETT: Yes, Your Honor.

THE COURT; Who is your witness?

MR. JETT: Keshia Dixon.

THE COURT: Ms. Dixon, do you want to come around to the witness stand?

(Whereupon, the jury entered the courtroom)

THE COURT: Ms. Dixon, raise your right hand and be sworn in.

(Whereupon, the oath was administered by the Court)

KESHIA CHERIE ASHFORD DIXON,

TESTIFIED ON DIRECT EXAMINATION BY MR. JETT AS FOLLOWS:

Q. Would you state your name, please?
A. Keshia Cherie Ashford Dixon.

Q. Can you sit up a little bit so you can talk Into the microphone, please. And I don't know if the mic will pull toward you.

THE COURT: The microphone adjusts. The chair doesn't, but the microphone does.

MR. JETT: Q. Are you the Defendant in this case?

THE WITNESS: A. Yes.

Q. How old are you?

A. Thirty-six.

[550] Q. Where were you born?

A. Hunt County.

Q. What city?

A. Greenville, Texas.

Q. What does your family consist of when you were growing up?

A. What did they consist of?

Q. What did it consist of? In other words, who was in your family?

A. My mother, my stepfather, my six sisters, and a brother. Q. And what kind of work did your mom do?

A. She do health care.

Q. Does she still do that?

A. Yes.

Q. How about your dad?

A. He has his own business. It is construction.

Q. And you say you grew up with your stepfather. Do you know who your real father is?

A. Yes.

Q. And after a while growing up you had a relationship with him as well?

A. Yes.

Q. Did you go to high school?

A. Yes, I did.

Q. And did you graduate?

A. Yes.

[551] Q. And where did you go to high school?

A. Greenville Senior High.

Q. When d'd you graduate?

A. 1996.

Q. After you graduated from high school, did you have a baby?

A. Yes.

Q. And which one was that?

A. Ve'Queshia.

Q. Is that the first young lady we saw yesterday?

A. Yes.

Q. Are you proud of her?

A. Yes, I am.

Q. Did you marry her father?

A. No.

Q. Was that your choice or his choice or a mutual choice?

A. It was a mutual choice.

Q. Later on did you have Joycelyn?

A. Yes.

Q. And was her father wanting to be involved in her life at the time?

A. Off and on.

Q. And at some point you got married, did you not?

A. Yes, I did.

Q. And also at some point you moved from Greenville to the Dallas area?

[552] A. Yes.

Q. About when was that?

A. It was like 1988.

Q. Prom the time you got out of high school until you moved to Dallas did you work?

A. Yes.

Q. Where did you work?

A. I worked at Henslin (phonetic) Factory and Braum's.

Q. And when you moved to Dallas did you work?
A. Yes.
Q. Where did you work?
A. I was working at Kroger.
Q. Did you get married at some point?
A. Yes, I did.
Q. And who did you get married to?
A. Ted Dixon.

MR. JETT: Your Honor, may I approach the bench just a moment?

THE COURT: Yes.

(The following was had outside the presence and hearing of the jury)

MR. JETT: I know you ruled previously about going into the relationship with Mr. Dixon. Are we still under—Is that still the status of your ruling?

THE COURT: I think it has come out. I don't want to [553] spend a lot of time on it, but I think you are entitled to go into it some. Obviously that is not the direct cause of the duress. I don't want to spend a lot of time on it, but I think it is fair now.

MS. HEATH: We still object to the relevance of that, when the Government did not go into any relationship with Dixon except current relationships.

THE COURT: That is true, but you opened the door by your questioning, and then why didn't they call him. And think that is the way—That is how I think you opened the door for it.

MS. HEATH: For the record, we object as to the prejudice that that would put on the Government, because that goes to simply a sympathy matter. It does not go to the issue of duress, and the jury is not supposed to be considering sympathy in this case.

THE COURT: I understand it doesn't go to duress, but it goes to an issue that you opened up by your questioning. That is why I am letting it in, if you will cover it in that format.

MR. JETT: And in the format of asking her why she wouldn't call Ted Dixon.

THE COURT: That is how it becomes relevant, otherwise it isn't relevant, if that is why she didn't call him. If there is another reason, then obviously it wouldn't [554] be; but if that is why she didn't call him, that would be relevant to that.

MR. JETT: Okay. Thank you.

(The following was had in the presence and hearing of the jury)

MR. JETT: Q. And so you married—When did you get married?

THE WITNESS: A. 1931. I am sorry. 1991.

Q. And who did you get married to?

A. Ted Dixon.

Q. Now, there was some discussion yesterday about you wouldn't call Ted Dixon under the circumstances that you found yourself in. Why is that?

A. Why I wouldn't call Ted Dixon?

Q. Yeah. Was there something about your marriage and relationship with Ted Dixon that would make it so you didn't want to call him about those problems?

A. Yes.

Q. And what was that?

A. Me and Ted had some of the similar problems.

Q. Was Ted—When you say "similar problems," would you tell the jury about that, please?

A. Yes. He was abusive towards me and my childrens.

Q. When you say "abusive," what did he do?

A. He jumped on me; he beat my kids.

[555] Q. Was this a regular thing throughout your marriage?

A. Yes, it was.

Q. Did you separate from him at one time?

A. Yes.

Q. Did you all get back together?

A. Yes.

Q. And at some point did you actually incur serious injury?

MS. HEATH: Your Honor, we object to leading the witness, and ask that the witness be allowed to answer in her own words.

THE COURT: sustained.

MR. JETT: Q. At some point can you tell the jury whether or not you suffered some injury from Mr. Dixon?

THE WITNESS: A. Yes, I did.

Q. What was the nature of that?

A. I went through a window.

Q. And what was going on just before you went through the window?

A. We was fighting, and I had told him I was going to leave him.

Q. And then what happened?

A. Next thing I know I went through the window.

Q. Okay. And after you went through the window, what happened?

A. I was told he picked me up and took me to the hospital.

[556] Q. Did you go to the hospital?

A. Yes.

Q. And did you—Tell me whether or not you continued to live with him for some time after that?

A. Yes.

Q. When did you go through the window?

MS. HEATH: Your Honor, we object as to the relevance of this and her January 2003 decision as to whether or not she would call Mr. Dixon.

THE COURT: Overrule the objection. Go ahead.

MR. JETT: Q. When did you go through the window?

THE WITNESS: A. I think it was in 1998, '99. I am not quite sure.

Q. After you went through the window, can you tell us whether or not you lived with Mr. Dixon after that?

A. Yes, I did.

Q. Eventually did you all split up?

A. Yes.

Q. Did you leave him or did he leave you?

A. I left him.

Q. And after that did you all get divorced?

A. Yes.

Q. When did you get divorced?

A. In 2001.

Q. Now, your maiden name was what?

[557] A. Ashford.

Q. Did you take on another name when you got married?

A. Yes; Dixon.

Q. So you were known as what before you got divorced?

A. Keshia Cherie Dixon.

Q. And after you got married—Excuse me. After you got divorced, what did you decide to do about your name?

A. I took my maiden name back.

Q. And what was that?

A. Ashford.

Q. Okay. And after you got divorced, at some point did you change your driver's license?

A. Yes.

Q. Do you remember when that was?

A. I don't know the exact date.

Q. Can you tell us approximately when it was?

A. I think it was in 2002.

Q. And when you changed your driver's license, what was the name that you changed your driver's license to?

A. Ashford.

Q. So what would have been on the driver's license?

A. Keshia Cherie Ashford,

Q. At the time you changed your driver's license, did you put your correct address on it?

A. Yes.

[558] Q. Now, after you changed your driver's license, did you move again?

A. Yes, I did.

Q. Do you remember what address you lived at when you changed your driver's license?

A. I was living on Skillman.

Q. And do you remember how long after you changed your driver's license did you move?

A. Maybe two to three months later.

Q. After you moved, did you change your driver's license?

A. No, I didn't.

Q. Is there a reason why?

A. No.

Q. Can you—When you moved from the Skillman address, where did you move to?

A. Melody Lane.

Q. And who did you live on Melody Inane with?

A. Me and my childrens.

Q. Who are they?

A. Ve'Queshia Joycelyn, Divinity.

Q. Who is Divinity's father?

A. Ted Dixon.

Q. Was she born during your marriage to Mr. Dixon?

A. Yes.

Q. When you were living on Melody Lane, what kind of an [559] apartment did you have there?

A. I had a one bedroom.

Q. Now, after you divorced from Ted Dixon, were you working?

A. Yes.

Q. What were you doing?

A. I was the deli manager at Wal-Mart.

Q. And at some point did you lose that job?

A. Yes, I did.

Q. After you lost that job, did you start to do other things to earn a living?

A. Yes.

Q. What was that?

A. I got involved in a check scam.

Q. Okay. And you were arrested, Were you approached by the agents for the government?

A. Yes, I was.

Q. And as a result of that, being approached by them, did you decide to assist them?

A. Yes, I did.

Q. And what did you do?

A. I helped them—It was a guy that was giving me the checks to give to other people to cash, and they wanted to catch him, like I guess like that he is giving me the checks or I am giving him the people from the people cashing the checks. And they had it set up on a Saturday where they had me call him [560] and he brought me some checks.

I told him I had a couple of people that wanted to cash them. And they had me come to the office, I had the checks, I gave them the checks, they gave the checks back to me, they had me call him to tell him where to meet me at. We never took anybody to go cash the checks or anything, so he was thinking he was coming to meet me to get the money. Silt

instead, they had the checks in between newspaper, and had him walk to my car. He is supposed to walk to the car and I hand it to him.

Q. Ms. Dixon, did he get arrested?
A. Yes, he did.
Q. And did you plead guilty to a charge?
A. Yes, I did.
Q. Okay. And that had to do with being involved with this check cashing scheme. Is that correct?
A. Yes.
Q. And you pled guilty in this court. Is that right?
A. Yes.
Q. And did you receive a sentence?
A. Yes, I did.
Q. What was your sentence?
A. Twelve months.
Q. Now, while this case was pending, after you had helped the Government, did you meet somebody?
A. Yes, I did
[561] Q. And who did you meet?
A. Thomas Earl Wright.
Q. Does he have a nickname?
A. Pacman.
Q. Can you tell me when you met him?
A. It was in 2002.
Q. Do you remember about what time?
A. Around August.
Q. And how did you meet him?
A. I met him at a liquor store.
Q. Did—What did you think of him at first?
A. I liked him.
Q. Do you know about how old he was?
A. No, not at the time.
Q. Did you and he start to go out?
A. Yes.
Q. Did you become involved?

A. Yes.

Q. At the time this all happened, what was—Had you pled guilty in this case here? I mean in the other case. Excuse me.

A. No, I hadn't; no.

Q. So that case was still pending?

A. Yes.

Q. When you met him were you working?

[562] A. Yes.

Q. And did you all—How did you get along at first?

A. We got along okay.

Q. Did you all have—Did you like him a lot?

A. Yes.

Q. And did he start spending a lot of time with you?

A. Yes.

Q. And where were you living at this time?

A. On Melody Lane.

Q. Now, would it be accurate, did he spend a lot of time or just a little time with you?

A. Off and on.

Q. Was—To start with, did you have a good relationship or not a good relationship to start with?

A. It started out; yeah.

Q. How was it when it started out?

A. It was okay.

Q. And as you went on, did the relationship change?

A. Yes, it did.

Q. How did it change?

A. We started arguing and fighting.

Q. And what were you arguing and fighting over?

A. About money, about my car, about places I wanted to go.

Q. What were the arguments about in terms of the money?

A. He wanted me to give him money.

[563] Q. Did you do that sometimes?

A. Yes.

Q. And what about your car?

A. He had my car.

Q. When you first met him did you think he had a car or did not have a car?

A. He had me under the impression he did.

Q. When you first met him did you have the impression he had his own place to live?

A. Yes.

Q. Okay, Did it turn out that those things were true or not true?

MS. HEATH; Your Honor, we object to the constant leading, and request that the Defendant be allowed to answer the questions in her own words.

MR. JETT: My last question was were they true or not true.

THE COURT: I think that question is okay. Go ahead.

MR. JETT: Q. Were those things true or not true?

THE WITNESS: A. It wasn't true.

Q. But you continued to still have a relationship with him?

A. Yes.

Q. In terms of the fighting, what did the fighting consist of?

A. Hitting and throwing things, breaking things.

[564] Q. Did you suffer any injury?

A. Yes.

Q. What kind of injury did you suffer?

A. I had bruises on me.

Q. Where were the bruises?

A. On my arm, back, and shoulder.

Q. Were these bruises places where they could be seen when you were dressed or places where they couldn't be seen when you were dressed?

A. Places they couldn't be seen.

Q. During these fights in this earlier part of the relationship, can you tell the jury, did he hit you any place else?

A. No.

Q. Can you tell the jury' did he hit you other places where the injuries could be seen?

A. No.

Q. Did you still, even though you all were fighting, did you still stay with him for a while?

A. Yeah.

Q. At some point did you all not see as much of each other?

A. Yes.

Q. Now, was he gone completely out of the picture or did he still come around some?

A. He still came around.

[565] Q. Was there a time when he started coming around more after you all broke up or after you quit seeing each other as much?

A. He was still coming around all the time.

Q. And when did—Was there a time when you all kind of got back together?

A. Yes.

Q. When was that?

A. Like the end of November, around the first of December.

Q. Now, after you had all of these problems with him, why did you get back together with him?

A. I was in the process of getting ready to move to a two bedroom, and I had been sitting around there waiting for my family to come help me move. My brother—

Q. I am not talking about that. I am talking about before that, if I can. Was there a reason -- Did he say anything to you or do anything that convinced you to go back together with him?

A. Did he say anything?

Q. Uh-huh. Did you all have any discussions about your relationship?

A. Yes. He told me I was always his and he done let me have all the fun.

Q. You were getting ready to move into a two bedroom apartment. Is that correct?

A. Yes.

[566] Q. And who was supposed to move you?

A. My brother.

Q. Did he show up?

A. He showed up later.

Q. How did you get moved?

A. Pacman, Hookie, and Tyshon, and Derek was there also.

Q. And now Pacman is who?

A. Thomas Earl Wright.

Q. Okay. As your daughter says, is it Thomas Earl Wright, Jr.?

A. Yes.

Q. Who is Hookie?

A. Hookie is Cory Sanders.

Q. Who is Tyshon?

A. Tyshon Hillary.

Q. And who is Derek?

A. Derek is Derek McBiller (phonetic) I believe is his last name.

Q. who are these guys?

A. Pacman's family. Hookie is a friend of his, and the other one is his cousin, and Tyshon say he is his brother, but I found out that is his cousin also.

Q. And so you were saying that you were trying to move. And what did these guys do?

A. They moved me.

[567] Q. And how did that make you—How did you feel about that?

A. I told him "thank you," because I didn't know how I was going to get moved, because I had to be moved out that day.

Q. And now, do you recall the evidence earlier about signing a lease on December the 5th?

A. Right.

Q. When did you move?

A. The next weekend.

Q. After—You said your brother did show up?

A. Yes.

Q. And after you moved, did somebody come to live with you?

A. Yes.

Q. And who was that?

A. Pacman.

Q. Now, was that okay with you at first?

A. Yeah, it was.

Q. Had you all been getting along better?

A. Yes.

Q. And after you moved in, after a while did something happen with regard to Pacman's attitude?

A. Yes. We started arguing.

Q. What were you arguing about?

A. We started arguing about the same basics--money and my car.

Q. And in particular, what were the arguments about money?

[568] A. That he was telling me that he needed some money, and every time he asked me to do something r always wanted to know why he need it, and where is he going. He said I am always questioning him, and he told me that if it wasn't for him that I would never have got moved so I owe him.

Q. Okay. Did he say anything about him and the apartment?

A. He said it was his apartment.

Q. Okay. Was he paying the rent there?

A. No, he wasn't.

Q. Did he say anything else about his role or what—

A. He said he is the man of the house and he can do what he want to do, and I just have to stand by and abide by what he say.

Q. Did you agree with that?

A. No.

Q. Did he do something to back up what he said?

A. Yeah. We started fighting, and then he pointed a pistol at me.

Q. Let's—When you all were fighting, what would happen to you?

A. I would get beat up.

Q. Okay. Again, where would you get beat up?

A. My arms, my back, and my shoulder.

Q. How often did this happen?

A. Sometimes twice a week.

[569] Q. Would your kids see this?

A. Sometimes.

Q. Were there other times when they wouldn't see it?

A. Yes,

Q. Where would that happen?

A. When they wouldn't see it?

Q. Yes, ma'am.

A. They would hear it, but they wouldn't see it. Sometimes we would be in the bedroom.

Q. Now, shortly after you moved did you have another problem?

A. Yes.

Q. What was that?

A. I lost my job.

Q. And where were you working?

A. At a daycare.

Q. Okay. And how did you lose your job?

A. They said Ted had called and had told them that I had a case and I was a felony, and I shouldn't be working around kids.

Q. Okay. And who is Ted?

A. My ex-husband.

Q. So when did you lose your job?

A. In December.

Q. Was that before or after you moved?

A. It was after I moved.

[570] Q. Was it before or after Christmas? Do you remember?

A. It was before Christmas.

Q. Now, at that time were you -- Had you been sentenced in this case?

A. No.

Q. Not this case but the other case had you pled guilty?

A. Yes.

Q. So what were we waiting to do at the time?

A. Sentencing.

Q. Now, have you been able to hire your own lawyers for these cases?

A. No, I haven't.

Q. How do you have a lawyer now?

MS. HEATH: Your Honor, we object to this as to relevance.

THE COURT: Sustained.

MR. JETT: Judge, it goes to financial circumstances is the reason I am asking.

MS. HEATH: Your Honor, he already established she didn't have a job in December, and she said she had financial problems.

THE COURT: I don't know that that goes to any issue the jury has to decide. You established she lost her job. That is good enough.

MR. JETT: Q. Now, during this time in December, did [571] Pacman have a job?

THE WITNESS: A. No.

Q. And how were you able to live? Did you have some income?

A. I had some.

Q. what was that?

A. Child support.

Q. Now, when you were fighting with Pacman in December, did he hit you any other place than the shoulders, the back, the arms, that sort of thing?

A. No.

Q. As your relationship progressed into January, did it improve or did it get worse?

A. It got worse.

Q. How did it get worse?

A. we started fighting even more than what we used to.

Q. Were you getting hurt more or hurt less?

A. I was getting hurt more.

Q. Were you able to come and go as you pleased?

A. I went, but it was always someone with me.

Q. And who would go with you?

A. It would be him or either one of his friends.

Q. Like who would these friends be?

A. Rookie or Tyshon.

Q. Now, you did own a car, did you not?

A. Yes.

[572] Q. Did you have full use of your own vehicle?

A. No.

Q. And how is that?

A. Because Pacman had it a majority of the time.

Q. Now, toward the end of December or early January, did something happen that caused you to be even more afraid?

A. Yeah. I started hearing them talking about some murders they were supposed to have been involved in.

Q. How did that make you feel?

A. I was afraid.

Q. Before this did you have any idea that they had been involved in this sort of thing?

A. No, I didn't.

Q. Was anything said to you about what you overheard?

A. As far as the murders?

Q. Yes.

A. Yeah.

Q. I am not going to ask about what they said about the murders, but did they say something to you about what you heard?

A. Yeah.

Q. What was that?

A. They told me that the laws couldn't find it, the people that—

Q. Let me back up. Did you overhear—Let me—Did they say something to you about overhearing something?

[573] A. About the gun show.

Q. Okay. There was a—Let's go to the gun show; okay? Let me ask this question. Was there a—Did they have some kind of a fear about you having overheard something?

MS. HEATH: Your Honor, we object. Mr. Jett has been trying to lead Ms. Dixon through this, and she has indicated she doesn't remember what it is they are talking about. We object.

MR. JETT: Okay.

THE COURT: Sustained.

MR. JETT: Q. At some point was there discussion about a gun show?

THE WITNESS: A. Yes.

Q. Okay. When was that?

A. It was on a Saturday. It was on a Friday night.

Q. Okay. And prior to this had they made any other threats against you?

A. No.

MS. HEATH: Your Honor, we object. We have now expanded from Pacman to "they." Apparently now we have a gang of people making threats against her, and we would like people identified if there are additional people making threats against Ms, Dixon.

THE COURT: She said no,

MR. JETT: Q. Let's talk about the Friday night [574] before the gun show. Did guns come up?

THE WITNESS: A. Yes.

Q. Who was there when guns came up?

A. Pacman, Tyshon, Hookie, and Pacman's cousin from south Dallas.

Q. And what came up?

A. He was telling him that he was going to get ready and go to—

MS. HEATH: Your Honor, we object to hearsay.

MR. JETT: This is not offered for the truth of the matter asserted, but only what was said to show her state of mind.

MS. HEATH: Also the individual has not been identified. We object to hearsay.

THE COURT: I think it is admissible. Identify the individual.

MR. JETT: Q. Who was saying about he was going to the gun show?

THE WITNESS: A. His cousin.

Q. Who was that?

A. Twin. They called him Twin.
Q. What was he saying about the gun show?

MS. HEATH: We object to Twin's statement.

THE COURT: Is this a statement from Twin?

MR. JETT: Yes.

[575] MS. HEATH: It is hearsay. There is no relevance to the statement. Twin has not been a person so far that has been threatening or hitting or abusing Ms. Dixon or making her in fear of her life to go buy firearms.

THE COURT: I tend to believe it would be hearsay.

MR. JETT: Q. As a result of what was said, that Twin said, was anything said to you about the gun show?

THE WITNESS: A. Yes.

Q. What was said?

MS. HEATH: Your Honor, again we object to hearsay. We haven't—

THE COURT: By who?

MR. JETT: Q. By who?

THE WITNESS: A. Pacman.

Q. What did he say?
A. We going to go to the gun show, and that I am going to get some guns for him.
Q. Okay. And what did you say to him about that?
A. I told him I was not going to the gun show and I wasn't going to get any guns.
Q. Okay. What happened after that?
A. We started arguing and starting fighting.
Q. Okay. what did the fight consist of?
A. Hitting, choking, and he pointed the gun at me.
Q. Where did this take place?

[576] A. In the bedroom.

Q. Okay. Had you been awake or asleep?

A. I was asleep.

Q. So you were asleep. Tell us how you woke up.

A. I woke up and I had got up and went to the restroom, and I heard them talking in the living room. And I laid back down.

Q. Okay. And then what happened?

A. And then later on Pacman came into the bedroom.

Q. And then what did he do?

A. He asked me if I was asleep, and I said "Uh-huh." And then he said, "Get. up. We need to talk."

Q. And tell the jury what happened after that,

A. He told me that we was going to go to the gun show and I was going to get some guns for him. We started arguing and fighting, and then he pointed the gun and told me that, "You don't think I will kill you but I will. You are going to do what I want you to do."

Q. During the fight, did anything—Was it the same fighting where he hit you on the arms and the back?

A. No. He split my lip.

Q. Had he ever done that before?

A. No.

Q. Had he ever pointed a gun like that at you before?

A. No.

Q. What did you think when he pointed the gun at you?

[577] A. I started thinking about the times I heard him in there talking about the murders.

Q. Did he say anything else about what he might do to you with the gun?

A. He told me that if I don't do what he told me to do, he going to kill me; and that he know how much I love my kids, and if I don't do what he want me to do, he going to have to kill my kids, too, because they know he's there.

Q. How did you feel about this?

A. I was afraid.

Q. When he pointed the gun at you, where did he point it at?

A. In my face.

Q. When he was pointing the gun at you, or what was he saying when he pointed the gun at you? Is that what you just told the jury, or was there something else?

A. Yeah.

Q. Which one?

A. He was pointing the gun at me.

Q. Is that when he was threatening to kill you?

A. Yes.

Q. So what happened the next day?

A. We went to the gun show.

Q. Who went?

A. Me, Pacman, Tyshon, and Rookie, and his sister Farrah (phonetic) was there.

[578] Q. Where were your kids?

A. They was at home.

Q. And did you all get to the gun show?

A. Excuse me?

Q. Did you all get to the gun show?

A. Yes.

Q. Did he say anything to you when you arrived at the gun show?

A. Just do what he told me to do.

Q. Did he say anything else?

A. He told me that somebody was there with my kids, and it is not nothing but a phone call away.

Q. Had your kids been left at home or not?

A. Yes.

Q. Had they been left at home?

A. Yes.

Q. How did you feel at that time?

A. I was afraid. I didn't know what to do.

Q. Did you all go in to the gun show?

A. Yes.

Q. Where was the first gun show?

A. At the Market Hall.

Q. Do you remember the first gun that was bought?

A. Yes.

Q. Okay. Which one was that?

[579] A. The .380s.

Q. Do you remember who that was bought from?

A. Who the dealer was?

Q. Yes.

A. No.

Q. Was it one of the people we saw yesterday?

A. Yes.

Q. Okay. Can you remember in particular which one?

A. I believe it was the first one.

Q. Now, did somebody—Well, did you decide what guns to buy or did somebody else decide?

A. Somebody else decided.

Q. Who decided?

A. Pacman.

Q. How did you know that is what he wanted you to do?

A. Because he told me—He pointed at me and showed me what it was that he wanted me to purchase.

Q. When you went to Mr. PrInington's tables, were you by yourself?

A. No.

Q. Who was there? Pacman and Hookie.

Q. Did you talk to somebody at those tables?

A. Yes.

Q. Do you remember in particular which one you talked to?

[580] A. I talked to the lady first.

Q. And do you remember your conversation with her?

A. No.

Q. It is okay. How did you feel while you were there?

A. I was nervous.

Q. Did you—Who did you talk to about or who did you tell you wanted to buy the guns? Do you know?

A. I told the lady.

Q. Do you remember what happened after that?

A. She told the guy and he said "I have to fill out the forms."

Q. Okay. And when you—Did you go fill out the forms?

A. Yes.

Q. Is there somebody there with you?

A. Yes.

Q. Who was there with you?

A. Hookie was standing behind me.

Q. Okay. Did you fill out the forms on your own, or did somebody tell you what to put on the forms?

A. Pacman walked up. I had just started filling out my name and stuff off of my driver's license on it, and Pacman walked up and told me to fill the forms out exactly the way he told me to.

Q. And did you do that?

A. Yes.

[581] Q. Why did you do what he told you to?

A. Because I was afraid of him.

Q. When you filled out the forms, there was a statement on there about whether you were under indictment.

A. Yes.

Q. Did you fill that out?

A. Yes.

Q. Okay. Did you tell the truth there?

A. No.

Q. Did you know that wasn't true?

A. Excuse me?

Q. Did you know that when you made the statement that you were not under indictment, that that was not true?

A. Yes, I did.

Q. Did you have a conversation with Mr. Pennington about the court system?

A. Yes.

Q. Would you tell the jury about that?

MS. HEATH: We object to the relevance about the court system with Mr. Pennington.

THE COURT: Overruled. You may ask.

MR. JETT: Q. You may answer the question?

THE WITNESS: A. I told him I was in the court system. And he asked me had I been sentenced yet, and I told him no. And he told me he was going to run it through and see [582] what it come back as.

Q. Was that okay with you?

A. Yeah.

Q. When you all were looking at the guns, did anybody else ask about the guns other than you?

A. They was picking the guns up and looking at them.

Q. Who is "they"?

A. Pacman and Hookie and Tyshon.

Q. Did you think you should be buying the guns?

A. No.

Q. What did you think when it came through?

A. I knew I wasn't supposed to be buying the guns, but when it came through I was like, "Well, you know, they told me I was not supposed to be around guns, and I knew I was in the court system and why was it coming back, why was, you know, why did he get me approved? He shouldn't have got approval because I knew I was in the court system."

Q. Did you feel like you were free just not to buy the guns?

A. Did I what?

Q. Did you think you were just free not to buy the guns at this point?

A. Did I think I wasn't free to buy them?

Q. Bad question. Do you think that you—At the time that you bought the guns did you think you were free not to buy them?

A. I didn't think I was supposed to be able to buy them.

[583] Q. Let me ask this. What did you think would happen to you if you didn't buy the guns?

A. I would have to deal with Pacman.

Q. What were you afraid that he would do?

A. If he didn't hurt me, he was going to mess with my kids.

Q. Okay. Were you afraid about whether or not he would kill you?

A. Yes.

Q. Were you concerned about whether or not you or your kids might suffer serious bodily injury?

A. Yes.

Q. Now, did you think that he was going to do it right there in the gun show?

A. No.

Q. What were you concerned about?

A. I was concerned about my kids.

Q. when the sale went through, who took the package?

A, Pacman.

Q. Now, was this the only gun you bought that day?

A. No. When I was filling out the form, he told me to tell the man that they wanted two instead of one, so they bought two of them there.

Q. After you finished the purchase at this gun dealer, did you buy another gun?

A. Yes.

[584] Q. Okay. And do you remember what you bought?

A. It was a .22.

Q. Do you remember what it was called?

A. They call it a Tec-22.

Q. And did it have a particular feature to it?

A. Yes.

Q. What was that?

A. A laser.

Q. Is that the red laser that we have seen before?

A. Yes.

Q. Does it look like that?

A. Yes.

Q. Obviously it wasn't this, was it?

A. No.

Q. It was a—But it made the red dot like this?

A. Yes.

Q. Now, when you went to buy that gun, who was with you?

A. Me, Pacman, Hookie, Tyshon, and Farrah (phonetic).

Q. Did you go there by yourselves?

A. No, I didn't.

Q. Was somebody right there with you?

A. Yes.

Q. And who was that?

A. Me, Pacman, and Hookie.

Q. What happened when you bought that gun?

[585] A. They looked at the guns and they was undocided, they walked off, we walked off, and they came back and they said that that one was cheaper than what the other dealer had, so that is the one he wanted.

Q. Let me ask you, let me go back to the first one. How did you get the money to pay for those first two guns?

A. They gave them to me.

Q. How did they do that?

A. They—While they was running the check, they was calling—The guy had my driver's license and the paper, and he was on the phone talking to them, and he gave—They handed me the money. And then Hookie told him that he better give me enough for tax also so that I wouldn't have to turn around and ask for no more money.

Q. Okay. Did—And was this right out in the open where that happened where they gave you the money, or was it kind of slipped to you?

A. They slipped it to me.

Q. Now, when you bought the Tec, why did you buy that gun?

A. That is what they wanted.

Q. what were you afraid would happen to you if they didn't buy the gun?

A. something is going to happen to me and my kids.

Q. And that something, what were you afraid that would be?

A. He was going to kill us.

[586] Q. Now, you were afraid he was going to kill you right then or kill you later?

A. He was going to kill me later.

Q. And if you had just at that point run off somewhere, did you have any other fears of what would happen?

A. Yeah. Something is going to happen to my kids, because my kids wasn't with me.

Q. Now, when you paid for the Tec-22, again how did you get the money?

A. Pacman gave it to me.

Q. Was it right out in the open or did he slip it to you?

A. He slipped it to me.

Q. When you filled out the form, was somebody there when you filled out the form?

A. He was there.

Q. Did he give you any instructions about the form?

A. Just do it as I was told.

Q. Again, you filled out the form. Do you know that the information there was incorrect? Is that right?

A. Yes.

Q. Now, with this second man, did you bring out the fact you were in the court system?

A. No.

Q. Why not?

A. Because it didn't do nothing the first time.

[587] Q. How did you feel about buying the guns?

A. I don't like guns.

Q. Had you ever owned a gun?

A. No.

Q. Had you ever shot a gun?

A. No.

Q. Did you want guns in your house?

A. No, I didn't.

Q. How did you feel about what you did?

A. I felt bad about it, but I didn't know what to do.

Q. Were you afraid of anything if you tried to do something?

A. I was afraid what was going to happen to me and my kids.

Q. Now, the following week, the next few days after this first gun show, what was it like around the house for you?

A. It was worse.

Q. How is that?

A. I couldn't do anything. I was already unable to do anything. It just got worse. We fought even more. He was around. He was around even more. Instead of just him leaving and leaving people there, the majority of the time he was there.

Q. During the time between the two gun shows did you all fight?

A. Yes.

Q. what happened to you?

[588] A. I would get beat up.

Q. How many times would you get beat up?

A. Too many to count.

Q. Just in this week I am talking about—the week between the two gun shows.

A. About four or five times.

Q. During that week while you were getting beat up did you have any other concerns?

A. How could I get some help.

Q. Were you free to go places by yourself?

A. No.

Q. Were you free to call, use the telephone?

A. Sometimes I pick up the phone and somebody—If I pick up the phone Pacman ask me who I am calling, or either one of the other guys be in the back and pick up the phone and listen to the conversation. If somebody called for me, they will ask who it is what you want.

Q. During this week can you tell the jury whether or not you were afraid of anything?

A. Yes.

Q. What were you afraid of?

A. I was afraid of Pacman and them.

Q. Was—After he got this Tec-22, what did he do with this?

A. He carried it around with him everywhere.

Q. Did he play with it sometimes?

[589] A. Yes.

Q. What did he do?

A. He points it at me.

Q. What would he do when he pointed it at you?

A. Re asked me, he said, "you don't think I will kill you, do you?"

Q. What was your response?

A. And I told him yes.

Q. Did you say anything more?

A. I told him one time, "If you are going to kill me, just kill me because I am getting tired of you threatening me."

Q. Did he do that?

A. Did he do what?

Q. Obviously he didn't do that.

A. No, he didn't.

Q. When he would point the gun at you, what would also get pointed at you?

A. The laser.

Q. Is that the red dot?

A. Yes.

Q. Where would you—Would you see the red dot?

A. Yes.

Q. Where would you see it?

A. Sometimes he point it at my face, and sometimes I look down and it is on my chest.

[590] Q. Did he point it at anybody else?

A. He pointed it at my daughter.

Q. Which daughter?

A. Joycelyn.

Q. How did that make you feel?

A. I knew he was for real.

Q. When he would point the red dot at you, would he say anything, any other thing?

A. Sometimes he would say, "You know what this means?" And sometimes he would say, "You know I will kill you."

Q. Why didn't you go to the authorities?

A. I was afraid.

Q. What were you afraid about?

A. I didn't think anything would really get done because of my past history.

Q. Why didn't you tell Mr. Rodriguez in Pretrial Services?

A. I was afraid. I was afraid to tell anybody anything.

Q. Why were you afraid?

A. Because I didn't want nothing to happen to me or my kids.

Q. When did it come up to you that you all were going to another gun show?

A. On that Saturday, a week later.

Q. What happened?

A. When he woke me up he had the gun pointed at me.

Q. Did he say anything?

[591] A. I hit the gun, and I told him to stop. I said, I told him, you know, "I am afraid of guns. Why do you keep pointing these guns at me. Why do you keep doing me like this?"

Q. And what did he say?

A. He said he wanted me to realize he is for real and he is not playing.

Q. Did you go to a gun show that day?

A. Yes, I did.

Q. Where did you go?

A. we went to Mesquite, Big Town.

Q. Who went?

A. Me, Pacman, and A.D.

Q. Who was at the apartment when you left?

A. Hookie and Tyshon was there.

Q. How about your kids?

A. Queshi and Joycelyn was there.

Q. Before you went into the gun show, did Pacman say anything to you?

A. He told me I know the routine; I know what to do.

Q. At that point did you know what to do?

A. Yes.

Q. What did you think you were supposed to do?

A. I was supposed to fill out the forms and get the guns they point at.

Q. Did you go to the gun show?

[592] A. Yes.

Q. what happened at the first booth or tables that you went to?

A. I think—

Q. Do you remember which one was first?

A. I think the first one was the pistol.

Q. What do you remember about that one?

A. They looked at the guns, and A.D. told Pacman that that was the one he wanted. And they looked at one or two more, and Pacman tried to get him to get a different one and he didn't want that one, so he stuck with the same one.

Q. Did you all know what gun that was?

A. It was a nine.

Q. Did you have any trouble buying that one?

A. No.

Q. At the time you filled out the forms, did you know that what you put on the form was not true?

A. Yes, I did.

Q. And why did you do that?

A. Because that is what I was told to do, and I was afraid of Pacman.

Q. What did you think would happen to you if you refused?

A. He would kill me.

Q. Were you afraid—

A. Or something would happen to my kids.

[593] Q. Again, how did you get the money to buy that gun?

A. He gave it to me.

Q. What is the next transaction that you remember?

A. I think it was the rifle.

Q. Do you remember the order in which these occurred?

A. No. We went back to the same table. We went back to that same table where the nine was.

Q. And were you able to buy—Who wanted to buy the rifle?

A. It wasn't—I don't think it is a rifle. I think it was—I think you all call it an M something.

Q. Was it one of the pistols?

A. Yeah.

Q. Let me ask you this. Do you recall how many firearms that were purchased on that day, the 11th?

A. Four.

Q. Now, were they all—Were they all purchased for the people with you or were they purchased for somebody else?

A Two was purchased for the people that was with me. The other two was some guys I didn't know.

Q. All right. How did—What did you observe about how that happened?

A. After the first sale we was walking off, and we stopped and he started talking to these two.

Q. Who is "he"?

A. Pacman started talking to two Hispanic guys.

[594] Q. And did you overhear the conversation?

A. Him and Pacman, Pacman and one of the guys walked off, and A.D. and the other guy stood there with me.

Q. All right. And then what happened with these guys?

A. And then he came back and he said, "Come on." And we all followed him back to the same table.

Q. And who is "he"?

A. Pacman.

Q. What happened?

A. We went back to the same booth where they had just got the pistol at.

Q. And what happened there?

A. They picked up—It was folded, and they picked it up and the guy showed him how to open it. And then they put it back down, and it was a rack with some guns on it. They start looking at that, and then he said, "The one we just put down is the one we want."

Q. Okay. Now, do you remember which particular table or booth this was?

A. I don't remember the guy's name.

Q. Okay. You saw these guys yesterday. Do you know which one of those it was?

A. It was the—He looked like he was in his mid 40s or 50s, and he had an Army-type jacket. He had a green jacket on.

Q. But do you remember which one of the guys it was yesterday

[595] that testified, the gun dealers?

A. It was one of those.

Q. Do you remember which one?

A. No.

Q. Now, when that gun was bought, who was it bought for?

A. The second one?

Q. Oh-huh.

A. It was bought for the Hispanic guys.

Q. When you filled out the paperwork, was there somebody there with you?

A. Yea.

Q. Who was there?

A. Pacman.

Q. What was he doing?

A. He was standing behind me.

Q. Was he saying anything?

A. He just told me to do what I was supposed to do.

Q. Where did you get the money?

A. From Pacman.

Q. Did he give it to you right there at the table or somewhere else?

A. The guy was checking. He was on the phone when they gave it to me.

Q. Was it right out in the open or was it kind of hidden?

Q. It was hidden.

[596] Q. Did that sale go through?

A. Yes.

Q. Who took the package?

A. Pacman took the package.

Q. And after he took the package, what did you all do?

A. We walked off and I saw him hand it to the Hispanic guy.

Q. Do you remember where you all went after that?

A. We went to a table and they looked at two different types of guns there. And then they walked off, we walked off, and they went to another table. And they went back, and that is when they got the other gun that the other Hispanic guy got.

Q. Did you go to the same table or another one?

A. I went back to the same one that they had looked at.

Q. Okay. And did you buy another one of those?

A. Yes.

Q. Do you know which gun it was?

A. It was the 45.

Q. And again, where did you get the money for that?

A. Got it from Pacman.

Q. Who was it for?

A. Who was it for? It was for the Hispanic guys.

Q. Did you make that arrangement?

A. No.

Q. Who made it?

A. Pacman.

[597] Q. When you filled out the forms, who was there?

A. Pacman. They all was there,

Q. After the sale was finished, who took the gun?

A. Pacman did,

Q. What did he do with it?

A. We started walking off, and he gave it to the Hispanic guy.

Q. How about the last gun? Do you remember that?

A. The last one that was purchased?

Q. Uh-huh.

A. It was at that same booth.

Q. What was that?

A. It was a rifle.

Q. Again, did you fill out the forms?

A. Yeah.

Q. Did you put the same information in the forms?

A. Yes.

Q. Do you know that part of it was not true?

A. Yes.

Q. Why did you do that?

A. I didn't have a choice, I was afraid for me and my kids.

Q. Now, you heard testimony about one sale that did not go through?

A. Yes.

Q. All right. Do you have some memory of that?

[598] A. Yes, I do.

A. Do you remember some discussion about a social security number?

A. Yes.

Q. Did you put the social security number on the form?

A. Yes, I did,

Q. Did somebody ask you to do it or did you just do it?

A. He asked me to.

Q. What did he ask you?

A. He told me that—

MS. HEATH: Your Honor, I object to hearsay.

THE COURT: I think that is admissible to show the state of mind to do what she did.

MS. HEATH: Can we identify for the record exactly who was making the statement?

MR. JETT: Q. Do you remember who made the statement?

THE WITNESS: A. I don't remember his name.

Q. Do you remember which one it was yesterday?

THE COURT: Let me ask you first if it was one of the ones here yesterday.

MR. JETT: Q. Was it one of the ones that was here yesterday?

THE WITNESS: A. Yes.

Q. Do you remember which one it was?

[599] A. It was the one, he had a beard and he had his hair back. His hair was long.

Q. And so what did he ask you about this social security number?

A. He told me that they had been having—that a lot of people had to wait because the system was down, and also that a lot of people had been getting delays because there was a lot of people calling in. And he said by putting the social security number it will make it go quicker.

Q. Was that okay with you?

A. Uh-huh. Pacman, he punched me and said, "Do it." So I put the social security number.

Q. Had anyone else asked you to put in a social security number?

A. No.

Q. So you wrote that down?

A. Yes.

Q. And was it your idea to do that or was it somebody else's idea?

MS. HEATH: Your Honor, asked and answered.

THE COURT: Sustained.

MR. JETT: Q. Okay. After the—Well, after the form was filled out, what happened?

THE WITNESS: A. The other guy was on the phone with the paper and my driver's license, and then he said something [600] to the other guy, and the guy came over there where we was standing, and he said that he was delayed, and to come back in about 15 or 30 minutes.

Q. Did you do that?

A. Yes.

Q. When they were checking, was Pacman standing right there or was he standing somewhere else?

A. They was right behind me.

Q. And what did you all do after he told you to come back?

A. We walked around and looked at other guns.

Q. Did you come back?

A. Yes.

Q. What happened when you came back?

A. They said it was still a delay.

Q. And then what happened?

A. We walked off, and then he told me to come back and ask them, to go ask them why and find out why. And he was also saying, Pacman was also saying that they are trying to keep his money. If they keep his money, that is a price I am going to have to pay.

Q. Now, when you say he said that, are you talking about Pacman?

A. Yes.

Q. So what did you do?

A. We went back over there and I questioned the guy about it.

[601] Q. Okay. Were you upset about it?

A. I was upset because of what Pacman was saying to me, but I wasn't upset about the purchase.

Q. What happened after that?

A. The guy explained it, and then we left again and we walked around, walked around, and then we went back and he told me to tell him that—

Q. Who is "he"?

A. Pacman. He told me to tell them that we had made a purchase somewhere else. And the guy said that was weird, and he don't understand why it was taking so long. "Maybe the system is down." And he told me do I remember what booth it was. I told him yeah. He said if I can go get some— He called the number something, and told me if I can go get it from the salesperson, he can call them back about it and find out what is going on.

Q. Did that happen?

A. Yes.
Q. And so what did you do?
A. I went back and r asked the guy about it.
Q. And then what did you do?
A. Then I took the number back to him.
Q. And after that did that make a difference?
A. No, it didn't.
Q. was that sale completed?
[602] A. No.
Q. Now, all the things that you did to try to complete the sale, was that something that you wanted to do?
A. No, it wasn't.
Q. Why were you doing those things?
A. Because I was threatened.
Q. And who threatened you?
A. Pacman.
Q. And what were you afraid of at this time?
A. I was afraid Pacman was going to kill me.
Q. Again, were you afraid he was going to do it right there or do it at a later time?
A. He was going to do it, but I didn't think he was going to do it there.
Q. After this sale didn't go through, what did you all do?
A. We ended up going back to another booth; the booth where one of the other guns was purchased from.
Q. Did you make a purchase there?
A. Yes.
Q. How many guns did you buy that day?
A. Four.
Q. And who were the two .45s for?
A. The Hispanic guys.
Q. And who were the other two for?
A. A.D. and Pacman.
[603] Q. Now, again when you bought these guns, did you do that of your own free will?
A. No.

THE COURT: Counsel, you have been over that now. We have covered that sufficiently. Let's get on to something else.

MR. JETT: Q. When you all left the gun show, was there something that was—Who had the guns when you all left the gun show?

THE WITNESS: A. The Hispanic guys had the .45 boxes, and Pacman and A.D. both had a box in their hand.

Q. Did you have a box?

A. No. I had the papers.

Q. When you say "the papers," what do you mean?

A. It was the receipts.

Q. Was anything happening as you walked out of the gun show?

A. Yes.

Q. What was that?

A. They was checking the gun boxes and they was checking the receipts with them.

Q. Did they check the guns that Pacman and A.D. were carrying?

A. Yes.

Q. How about the two Hispanic guys?

A. They didn't go out at the same time we did. We was still [604] in there. They left.

Q. But you had their paperwork?

A. I had the papers in my hand.

Q. After the gun show, where did you all go?

A. Back to my apartment.

Q. And when you got back to the apartment, did you want to go do anything?

A. I wanted to go to the grocery store.

Q. Did you do that?

A. No.

Q. Why not?

A. Because Pacman told me he had stuff to do, so I had to wait.

Q. Did you get to go at all?
A. About two days later.
Q. Did you go by yourself?
A. No.
Q. Who went with you?
A. Me and Hookie,
Q. Did Hookie go to some other places with you all?
A. Yes, he did.
Q. Where is that?
A. Church.
Q. And what Sundays did he go to church with you?
A. Every Sunday I went.
[605] Q. Okay. Let's talk about January; okay? Did you go to church in January?
A. Yes, I did.
Q. Did somebody go with you?
A. Yes.
Q. Who was that?
A. It was me, Hookie, and my kids.
Q. From your observation of Hookie—What is Hookie's name again?
A. Cory Sanders.
Q. From your observations of him, was he going for religious reasons?

MS. HEATH: Dour Honor, we will object to that as speculation. I don't think you can just necessarily look at somebody and tell the reasons they go to a religious service.

THE COURT: She may know based on conversations they had, or whatever, if she has a basis for knowing.

MS. HEATH: Then we object to hearsay.

THE COURT: She can answer the question whether he was going for religious reasons. You may answer that.

MR. JETT: Q. Did he appear to be going for religious reasons?

THE WITNESS: A. I hadn't known him going to church before.

Q. Okay. What did it look like to you that he was going for?

[606] MS. HEATH: Your Honor, we object to speculation.

THE COURT: Overruled. She may answer. Overruled.

THE WITNESS: A. I hadn't been allowed to he going anywhere by myself, but I thought that at least that when I said I was going to go to church that I was going to end up being able to go by myself, but I wasn't. Pacman told him that he was going to go, and I had to sit there and wait until Hookie got from his mother's house. The first Sunday we went that Hookie went, Hookie was at his mother's house and Pacman was there, and Pacman was going and he got a page and said that he wasn't going, and then told me that he had called Hookie and Hookie was going with me. So I had to sit there and wait until Rookie got there, and it would be all right for me to leave.

Q. The week after this second gun show what happened to you?

A. I got sentenced.

Q. When you were going to court, that was the 15th of January. Is that right?

A. Yes.

Q. When you were going to court, what did you think was going to happen to you?

A. I knew I was going to end up getting some time, but I didn't know how much.

Q. What did you think would happen in regard to your situation with—Let me ask this first. Did you think you were

going to have to start your time right then or get to wait [607] until later?

A. I thought I was going to have to go then.

Q. Did you have any ideas about what getting sentenced might do to your situation?

A. I would get away from Pacman.

Q. And what would happen with your kids?

A. They would end up going with my mother.

Q. Okay. Did you get sentenced that day?

A. Yes, I did.

Q. And what sentence did you get?

A. I got 12 months.

Q. Did you have to start serving your sentence at that time?

A. No. The judge was giving me 30 days to turn myself in, self-surrender.

Q. What was—When you were going to go in, what was going to happen with your girls?

A. I had planned on them going and staying with my mom during the 12 months, but Pacman had other ideas.

Q. What were his ideas?

A. He was talking about he was going to keep the apartment and the girls stay there. And we argued about it and fussed and fighted about it, and then he came up with the idea that he was going to keep my apartment and that my girls was going to go stay with his sister.

Q. And how did you feel about that?

[608] A. I didn't want neither one.

Q. Why?

A. Because I was—When I got the time I was happy when I got sentenced because I was feeling like this is my way of escaping from Pacman, and I end up in jail and my kids will end up in Greenville with my mother.

Q. After you were sentenced, did your relationship with Pacman change?

MS. HEATH: Your Honor, we object to this as beyond the time frame. The period of buying guns is now over. We object to the relevance of it.

THE COURT: Relevancy?

MR. JETT: Just to show that it was ongoing. I mean, I was going to go up to the time she was arrested.

THE COURT: I will sustain the objection. I think it is relevant to the duress offense. After that it is not relevant to anything the jury has to decide. So sustain the objection.

MR. JETT: Q. When did you get arrested?

THE WITNESS: A. On February the 3rd.

Q. What day of the week was that?
A. I believe it was a Monday.
Q. And where were you arrested?
A. Here at the federal building.
Q. You have been in jail since that time?
[609] A. No, I wasn't.
Q. Have you been out of jail since February 2nd when you were arrested? Where have you been staying?
A. I was staying at my apartment.
Q. You got arrested on February the 3rd. Right?
A. Right.
Q. Okay. After February the 3rd where have you been living? Have you been in jail?
A. I have been in jail.
Q. Have you been serving your sentence?
A. Yes.
Q. So when did you start serving your sentence?
A. On February the 3rd.
Q. Now, when you were arrested, did you talk to the agents?
A. Yes.
Q. Did you tell them about guns?

A. Yes.

Q. What did you tell them?

A. I told them that there was three guns there.

Q. Did you believe there were three guns there?

A. It was three guns there. I had seen them about three days before I got arrested.

Q. All right. Was Pacman—Before you got arrested, the night before you got arrested, can you tell the jury, was Pacman at your house or not?

[610] A. Yes, he was.

Q. When you talked with the agents, did you think the guns were there?

A. Yes, because I didn't see anybody walk out with them.

Q. The ammunition that was found, did that belong to you?

A. No.

Q. Who did it belong to?

A. It belonged to Pacman and Hookie.

Q. Did you buy any of those things?

A. No.

Q. The boxes, did they belong to you?

A. No.

Q. Did you own a gun?

A. No, I didn't.

Q. Did you buy a gun for yourself?

A. No.

Q. When you bought those guns, did you think you had a choice?

A. No, I didn't. I didn't think I did.

Q. And what did you think would happen to you?

A. I thought Pacman would kill us.

Q. And who is "us"?

A. Me and my children.

MR. JETT: Pass the witness.

THE COURT: Ms. Heath?

[611] CROSS EXAMINATION

By Ms. Heath:

Q. Good morning, Ms. Dixon.

A. Good morning.

Q. Now, you mentioned that you met Pacman at a liquor store in about August of 2002. Is that correct?

A. Yes, ma'am.

Q. And in August of 2002, you were already living on Melody Lane?

A. Yes.

Q. So during the time that you knew Pacman you have only had two residences—one on Melody Lane and one on Forest Springs?

A. Yes.

Q. And the Melody Lane address was a one bedroom, and the Forest Lane address was a two bedroom?

A. Right.

Q. Prior to the Melody Lane address you have been living on Skillman, which is reflected on your license. Is that correct?

A. Yes, ma'am.

Q. And you moved from the Skillman address to the Melody Lane address in July of 2002, the summer of 2002.

A. Yeah.

Q. And at the Skillman address you had been living with Tabyrai Sweat?

A. Yes.

[612] Q. And his mother Beverly?

A. She ended up moving in with us.

Q. In fact, you have used Beverly's name as a reference in applications for jobs, have you not?

A. Yes, I have.

Q. You relied on her and trusted her?

A. Yes.

Q. You thought that she felt strongly about you enough to give a good recommendation about you?

A. Yes,

Q. And you had differences with Tabyrai, did you not?

A. I had differences with who?

Q. You split up with Tabyrai Sweat?

A. Yes.

Q. In fact, there were some arguments and some fighting involved in that relationship as well?

A. Yes.

Q. Now, during all of the fighting that you told the jury about, you were also raising your voice. Isn't this true?

A. Yes, because I didn't want to do what I was told to do.

Q. And you resisted when they would tell you to do something and you didn't want to do it?

A. Right.

Q. And you made it known to whoever was telling you what you should do that you did not want to do these things?

[613] A. Exactly.

Q. And if there were things being thrown, you were part of throwing things as well?

A. Yes.

Q. And if there was hitting happening, you were hitting as well?

A. Yes; trying to defend myself.

Q. But also you were angry about being told what to do?

A. Because z didn't want to do it.

Q. Prior to living on Skillman with Tabyrai Sweat and his mother, did you live in an address on Abram's Road?

A. That is his mother's address.

Q. And did you live with his mother at that location or stay with her with your kids?

A. Yeah; until our apartment was ready.

Q. So there were two different residences that you actually lived with Tabyrai sweat or his mother?

A. Yes.

Q. So you have known her for quite a long time?

A. For a little bit.

Q. Now, you mentioned that you were married to Ted Dixon from 1991 through 2001.

A. Yes.

Q. And that was a physical, relationship; a violent relationship.

[614] A. Yes.

Q. But it is the same situation. He would yell; you would yell?

A. Yes.

Q. You didn't like what he was telling you to do, or you didn't like restrictions he was placing on you?

A. Right.

Q. You would have arguments about money?

A. Ted was more controlling. He wanted everything done his way.

Q. He didn't want you to go out and have a good time without him.

A. It wasn't just basically that. It was that when I wasn't working he wanted me to be sitting up at his job with him, When I got ready to leave to go somewhere, I had to call him and let him know where I was going, And he would call me to see if I am at the place I am saying I am going, and just so on.

Q. He didn't want you to go out and about without knowing where you were.

A. Right,

Q. And you didn't like that.

A. No. I couldn't even go to the grocery store without calling him.

Q. And that got violent where both of you were hitting each [615] other.

A. I was defending myself.

Q. And things were being thrown?

A. Yes.

Q. And at some point during that relationship, towards the end of the relationship you got a restraining order against him?

A. Yes.

Q. You sought help from the authorities?

A. Because of something that happened to my child.

Q. But you got a restraining order?

A. Right.

Q. And then you filed for divorce?

A. It was later; yes.

Q. You had an attorney to help you with that?

A. No. Ted filed the divorce.

Q. But there was an attorney involved in that divorce?

A. I was under the impression there was an attorney involved, and I found out there wasn't,

Q. For a short time after you left or you left Ted Dixon, you actually went back to Greenville for a while.

A. I was there for a couple of weeks.

Q. And you were dating a guy in Greenville for a while, for a short period of time?

A. Yes.

[616] Q. There was another guy named Chris that you dated for a short period of time?

A. Yes.

Q. And then you told the jury about your check counterfeiting scheme that you were involved in. Do you recall that?

A. Yes, I do.

Q. And you told the jury that you were having some financial problems, and you got caught up in this check counterfeiting scheme?

A. Yes.

Q. And you also recruited other people to cash counterfeit checks.

MR. JETT: I object. The details of that are not relevant to this.

THE COURT: Overrule the objection. She may ask.

MS. HEATH: Q. You recruited other people to go out and cash counterfeit checks.

THE WITNESS: A. Yes.

Q. So it is not just you going to the store and cashing a counterfeit check.

A. No.

Q. You recruited other people, gave them the check, told them where to go, and collected the money when it came back?

A. Yes.

Q. And during this period of time you were living with a [617] William Thomas?

A. Yes.

Q. And his nickname was Hollywood?

A. Right.

Q. Hollywood carried a gun on occasion.

A. Yeah, he did.

Q. And in fact one time—And during this period of time that you are dating either Chris or the other person from Greenville, or living with William Thomas, the guy nicknamed Hollywood—

A. Chris is Hollywood. That is the same person.

Q. So William Thomas is also Chris who is also Hollywood?

A. Yes.

Q. During this period of time, Ted Dixon is still in your life because you share a daughter Divinity.

A. Yes.

Q. And he has visitation?

A. Yes.

Q. And he is pretty good about getting over there every week if not every other week.

MR. JETT: I object to the relevance of the visitation arrangements.

THE COURT: Overruled. Go ahead.

MS. HEATH: Q. And he would take Divinity on visitation during weekends or during the week?

[618] THE WITNESS: A. He got Divinity when he got time to get Divinity?

Q. And there are occasions when he took the older girls because he developed somewhat of a relationship with them?

A. He had to work on weekends. When he did have Divinity he didn't have anybody to stay with Divinity, so he would ask one of them to come stay there instead of Divinity staying by herself.

Q. So the answer is yes, on occasion he would have the other girls as well as Divinity?

A. Sometimes; yes.

Q. In fact, you have called on Ted on occasion to either take the girls to school or pick them up on occasions when you could not get there.

A. Right.

Q. And to some degree you confided in Ted about some of your relationships about the problems you have had?

A. Yes, I have.

Q. About how violent they were or physically abusive they were?

A. Yes.

Q. Or the problems you had about them running around with somebody else?

A. No. He had called a couple of times to talk to Divinity, and he heard us arguing and he asked me what was going on.

[619] Q. In fact, one time when Ted had come by the house, Ted Dixon had come by the house, when you were living

with Hollywood, Hollywood and you had an argument and Ted called the police.

A. No, that is not true.

Q. And Hollywood actually went in back to the apartment to get a gun to scare Dixon off?

A. That is not true.

MR. JETT: This is not relevant to the case or the defense.

THE COURT: Overrule the objection. Go ahead.

MR. JETT: Can I have a running objection?

THE COURT: No, sir. You need to ask each specific one. I am not sure which ones you are complaining about, so you need to make a specific objection.

MS. HEATH: Q. Now, you mentioned that in December of 2002, you had just lost the job with Stone Way Private School. Is that correct?

THE WITNESS: A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. The Stone way Private School, you applied for that job in about May, the Spring of 2002. Do you recall that?

A. I believe so.

Q. And in the Spring of 2002 you were already under [620] indictment for an offense.

A. Yes.

Q. You did not disclose to the daycare center that you were under indictment for a felony offense?

A. They did a background check.

Q. In fact, that is the reason why you were dismissed from the location, because the background check came back from the state and showed that you were under indictment?

A. No, it didn't.

MS. HEATH: Your Honor, may I approach the witness?

THE COURT: Yes.

MS. HEATH: Q. Are you familiar with a man by the name of Danny Stone?

THE WITNESS: A. Yeah.

Q. And Danny Stone is the owner of the Stone Way Schools, is he not?

A. Yes.

Q. Let me show you a two-page document and ask you if you recognize that.

A. Yes.

Q. Is that your application to the private school?

A. Yes, that is my application.

Q. Do you see anywhere on the application where you advise them about the fact that you were under indictment?

MR, JETT: Excuse me, Judge. This is testimony about [621] a document that is not in evidence, and I would like to see what it is that counsel is having her look at.

THE COURT: She may ask her, and then show it to counsel.

THE WITNESS: A. Yes.

THE COURT: She has identified it as her application.

THE WITNESS: A. That is my application.

MS. HEATH: Q. The question was, did you see anywhere in here that you indicated that you were under indictment?

MR. JETT: Judge, may I see the document?

THE COURT: As soon as she answers the question, counsel.

THE WITNESS: A. I don't see anything about indictment.

MS. HEATH: Q. Did you disclose to the Stone Way Schools that you were under indictment for a felony offense at the time?

A. No.

Q. And you were terminated on December 13th, 2002, were you not?

A. Yes.

Q. And a background check came back from the state showing that you—

A. That is not why I was terminated.

[622] Q. You said that Ted Dixon—

MR. JETT: Counsel is talking about matters that are not in evidence.

THE COURT; Well, you went into that, counsel. You went into that job and why she was fired, so I think she is entitled to go into it.

Ms. HEATH Q. You said Ted Dixon had called the school to let them know you were under indictment?

THE WITNESS: A. That is what they told me.

Q. And they fired you because of that?

A. Yes.

Q. Because you were under indictment?

A. Yes; because I told her; yes. I didn't deny it when she asked me.

Q. But you hadn't disclosed it to them since May 2002 when you were under indictment until they found out and fired you December 12th, 2002,

A. Because Pretrial had told me that if they don't ask you if you are under indictment don't give the information; don't volunteer it.

Q. So Pretrial wants you to conceal information from your employers.

A. He told me if it wasn't—if they didn't ask me to give it to them, don't volunteer it.

Q. That is Louie Rodriguez?

[623] A. Yes.

Q. And prior to the job at Stone Way Schools, you worked for Walnut Place; isn't that true?

A. Yes. I was there a minute.

Q. You were there—Excuse me?

A. I was there for a minute.

Q. For a minute?

A. Yes.

Q. Was that from January 17th, 2002 to February 19th, 2002?

A. Yes.

Q. Barely a month?

A. Yes,

Q. And you were fired from that job because of unexcused absences?

A. I was sick a lot.

THE COURT: Let's go ahead and take the morning break. Let's go ahead and take a 15-minute recess. (Whereupon, the jury left the courtroom)

THE COURT: All right. Take a 15-minute break.

(Brief Recess)

THE COURT: Ready for the jury? Let's bring in the jury.

(Whereupon, the jury entered the courtroom)

THE COURT: Ms. Heath?

[624] MS. HEATH: Thank you, Your Honor.

MS. HEATH: Q. Ms. Dixon, while you were living at the Melody Lane address, which is the address right before Forest Springs, that is when you started dating and living with Pacman on and off.

THE WITNESS: A. Yes.

Q. And he didn't live there full time?

A. No.

Q. He had another residence some place else?

A. Yes.

Q. And that residence was on Peavy Lane. Is that correct?

A. I don't know anything about Peavy Lane.

Q. You don't know anything about a residence on Peavy Lane?

A. No.

Q. Did you ever live at a residence on Peavy Lane?

A. No, ma'am.

Q. Now, during the time you were living on Melody Lane, that is when your relationship with Pacman started getting a little rocky?

A. That is when I met him was Melody Lane.

Q. And you moved into the Forest Springs address like the second week in December of 2002.

A. Yes, ma'am.

Q. And when you moved into the new address, you had just gotten back together with Pacman?

[625] A. Yes, ma'am.

Q. You were separated for a little while?

A. He never stopped coming around.

Q. nut in your mind you were separated?

A. Yeah; in my mind, yes.

Q. So he is not living there anymore; he just comes around to visit?

A. He still had clothes there, but he was still coming around. But he wasn't—

Q. He wasn't sleeping there at night?

A. He didn't sleep there; no.

Q. So he would go some place to sleep?

A. No.

Q. He was not sleeping there?

A. No.

Q. In fact, you just had one bedroom there?

A. Right.

Q. And then you move into Forest Springs in December of 2002, and he is back in your life again?

A. Yes, ma'am.

Q. And sometimes he stays at that apartment at the Forest Springs address?

A. Yes, ma'am.

Q. But not every night?

A. Sometimes he didn't show up until 6:00 or 7:00 in the [626] morning.

Q. Sometimes he would spend it away?

A. Yeah.

Q. And if he was supposed to be your boyfriend, that made you angry.

A. No, it didn't.

Q. And you had some arguments about that?

A. No. It is when he was gone in my car and he didn't bring my car back until that time in the morning, yeah, we argued about that,

Q. Because you needed your car for the morning?

A. Yes, ma'am.

Q. Either to take the girls to school?

A. Yes, ma'am.

Q. Or to take them to visit relatives, or things like that?

A. Yes, ma'am.

Q. So you move into Forest Springs right before the holidays, the Christmas holidays?

A. Yes, ma'am.

Q. And during the Christmas holidays you are visiting relatives?

A. I didn't go visit relatives.

Q. And your girls got to see their grandmother?

A. Yeah, I sent them to Greenville for Christmas.

Q. Okay. And they got to stay in Greenville for Christmas [627] for a period of time?

A. Yeah; they was there.

Q. And you have got a good relationship with your stepfather?

A. Yes.

Q. And he lives with your mother still?

A. Yes.

Q. And they have lived in Greenville for years and years and years?

A. Yes.

Q. And your real father lives in Greenville as well?

A. Yes, he does.

Q. And you have developed a relationship with him since being an adult?

A. Yes.

Q. And all three of them love the girls, love their grandchildren?

A. Yes.

Q. And they want to see them as much as possible?

A. Yes.

O. And you have sisters and brothers?

A. Yes, I do.

Q. Who also love the girls?

A. Yes.

Q. And your girls love them?

A. Yes.

[628] Q. And if need be, knowing you are going to prison, you have a family that can take care of your kids.

A. Yes.

Q. So you knew your mother was available to take care of your kids?

A. Yes.

Q. And you have talked to your relatives about the fact that "I may be going to prison. I need somebody to take care of the girls."

A. They didn't find out about it until the last minute.

Q. Until the last minute?

A. Yes.

Q. So you made no preparations as mother, knowing you were going off to prison, and leaving three girls under the age of 15 by themselves in their apartment?

A. No, that is not it.

Q. So you did make preparation?

A. They didn't know anything about the case until I found out that I may end up getting prison time. That is when they found out about it.

Q. And that was around the Christmas holidays?

A. No. I told my mother before that.

Q. So the Thanksgiving holidays?

A. I believe it was in October when I told my mother about it.

Q. So as of October, November, December, and January, going [629] up to your sentencing date, you are talking with your family members about preparations for your daughters?

A. Uh-huh.

Q. Where they need to go to school?

A. I talked to my mother.

Q. You also talked to Ted Dixon about the possibility of him keeping the girls while you were in prison?

A. Yeah. He was saying that they didn't want to go to Greenville. He had talked to Divinity and they didn't want to go to school in Greenville; they wanted to stay in the schools they was in in Dallas.

Q. And the girls told you that, too?

A. Yeah. They said they wanted to stay in school in Dallas.

Q. And they didn't have any problem in staying with Ted Dixon while you were in prison if they could stay in the schools here in Dallas?

A. Queshia and Joycelyn didn't, but Divinity did.

Q. So you talked to Ted Dixon about that?

A. Yes. And I told them that I didn't want them to be separated; I wanted them to be together, and he agreed with it.

Q. And Ted Dixon did not have any problem if all three girls wanted to stay with him, keeping all three girls?

A. Yes, he did tell me that.

Q. So as of December 2002 you are moving into a new apartment with two bedrooms?

[630] A. Yes, ma'am.

Q. You have Pacman back in your life?

A. Yes, ma'am.

Q. You lose your job?

A. Yes, ma'am.

Q. You have been making regular visitations to Louie Rodriguez, your Pretrial Services officer?

A. He was coming by once a month visit.

Q. So you were seeing him once a month at least?

A. Yes.

Q. And during that once a month, things he is concerned about are where you are living?

A. Yes, ma'am.

Q. who are you living with?

MR. JETT: Excuse me, Judge. I am going to object to what he is concerned about. That would be hearsay. She wouldn't have personal knowledge.

THE COURT: Overrule the objection. She may answer.

MS. HEATH: Q. You are providing him information about where you are living?

THE WITNESS: A. Yes, ma'am.

Q. And about who you are living with?

A. Yeah, I think so. I think that is one of the questions, too, that he asked.

Q. And where you are working?

[631] A. Yes.

Q. And you know that that was one of your conditions, that you are supposed to stay employed?

A. Yes.

Q. And during the times when you were not employed, you knew that you had to seek new employment?

A. Yes, ma'am.

Q. That was a condition?

A. Yes, ma'am.

Q. So when you lost the job at the daycare, you knew that you were going to need to look for a new job?

A. Yes, ma'am.

Q. Because Louie Rodriguez was going to be checking up on you?

A. Yes, ma'am.

Q. And these regular visits to Louie Rodriguez would continue so long as you remained out on bond?

A. Yes, ma'am.

Q. Now, you actually pled guilty to the counterfeit check case November 6th of 2002. Isn't that correct?

A. Somewhere around there. That is correct,

Q. So it is while you are still living on Melody Lane?

A. Yes, ma'am.

Q. So you appear in court that day and you plead guilty?

A. Yes, ma'am.

Q. And in preparation for that you meet with your attorney?

[632] A. Yes, ma'am.

Q. Arid then you have a meeting with Pretrial or the Probation Department so they can prepare a report for the Judge.

A. Yes, ma'am.

Q. That is Lisa Lamb, I believe?

A. Yes, ma'am.

MR. JETT: Excuse me, Judge. I object to the relevance of this.

THE COURT: Overruled. Go ahead.

MR. JETT: May I say one thing, Judge?

THE COURT: Yes.

MR. JETT: This is prior to the December time frame when we are talking, and so I just question the relevance.

THE COURT: I understand the objection, but I think she is entitled to go into it. Overruled.

MS. HEATH: Q. And the meeting with the probation officer Lisa Lamb was at the end of November of 2002.

THE WITNESS: A. Somewhere around there; yes.

Q. And you had a lengthy conversation with her about the case and about your personal background.

A. Yes, ma'am.

Q. And at no time during that conversation did you tell her you were having any problems with any relationship?

A. No, ma'am.

Q. And you knew your sentencing was set on January 15th, [633] 2003?

A. Yes, ma'am.

Q. And you told the jury earlier you thought there was a possibility that as of that day you may be going to jail.

A. Yes.

Q. And you were—You indicated to the jury that you were somehow looking forward to that only because it would get you away from Pacman?

A. I knew I was going to be punished for the case because I had pled guilty, and I knew I had did something wrong. That is why I pled guilty to it. And I had talked with my attorney, and I knew there was a possibility I may end up getting jail time. So yes, ma'am.

Q. So during November and December and January you have conversations also with your attorney on the phone?

A. A couple of times.

Q. And you actually go to his office on occasion?

A. I think I went one time.

Q. But you told the jury earlier that the day that you were going to be sentenced on January 15th, that you thought you were going to jail that day?

A. When I got sentenced, when they told me 12 months, didn't know I was going to have no 30 days to turn myself in. I thought I went then.

Q. So the answer was yes, you thought you were going to jail [634] on January 15th when you were sentenced?

A. Yes, ma'am.

Q. And you told the jury earlier that that would get you away from Pacman?

A. Yes, ma'am. But it didn't?

A. No, it didn't.

Q. You had to go home?

A. Yes, ma'am.

Q. And during your sentencing hearing, you had your mom up here in the courthouse?

A. Yes, ma'am,

Q. And you had Ve'Queshia, your oldest daughter, up here?

A. Yes, ma'am.

Q. And you had some other relatives up here. Who was up here with you?

A. There was—It was me, my daughter, my mother, and my uncle, and Ted was here.

Q. And your uncle's name is?

A. Donnie Sephus (phonetic).

Q. And Ted Dixon, your ex-husband, was up here?

A. Yes, ma'am.

Q. And so you had a support group ready to take care of the girls in the event you were taken to prison that day?

A. Yes, ma'am.

[635] Q. And earlier that day you actually met with your attorney prior to coming into the courtroom?

A. Yes, ma'am.

Q. And at no time did you tell your attorney or tell your family members that were here, tell Ted Dixon, tell the Court, tell any of the security officers that work in the building, the security at the first floor when you come through the magnetometers, any of the security on the court floor, that you were having problems, you had been harassed, threatened, forced to buy guns?

A. No, ma'am, I didn't.

Q. You didn't tell them that your life was in danger?

A. No, ma'am.

Q. You didn't tell them that your daughters' lives were in danger?

A. No, ma'am.

Q. You didn't tell them there was a man pointing guns at you and your daughter?

A. No, ma'am.

Q. You didn't tell them, "Please send a police vehicle out to my house to get my other daughters, or out to the school to get my other daughters"?

A. No, ma'am.

Q. They were in school that day, were they not?

A. Yes, ma'am.

[636] Q. In fact, that same day you met with Louie Rodriguez, your Pretrial Service officer, did you not?

MR. JETT: What day are we talking about?

MS. HEATH; January 15th.

THE WITNESS: A. I don't remember meeting him that day. I remember going to Mr. Jett's office.

MS. HEATH: Q. Ms. Dixon, let's go back to January 4th, THE first day of the gun show. It is your testimony that the gun show TOPIC came up the day before?

A. Yes, ma'am.

Q. Which would have been January 3rd, 2003?

A. Yes, ma'am.

Q. On January 3rd, 2003, you said that you were pretending to be asleep because you had overheard some talk about going to a gun show?

A. I had got up and went to the restroom, and when I got back in bed I heard them in there talking.

Q. Did you not say that you were pretending to be asleep?

A. Yes, I was.

Q. So the answer was you were pretending to be asleep?

A. Yes,

Q. And while you were pretending to be asleep, Pacman comes in and points a gun to your head?

A. Yes.

Q. And asks you if you are asleep, "Wake up. We are going to [637] the gun show"?

A. He told me there was something he needed to me to do. And then I said, "What?" And he is still talking about the gun show.

Q. So he basically put a gun to your head?

A. Yes.

Q. Told you you are going to go to the gun show?

A. Yes, ma'am.

Q. To buy more guns to put to your head?

A. Yes, ma'am,

Q. Or to put to anybody else's head?

A. Yes, ma'am.

Q. But that is not going to happen that day. That is going to be the next day?

A. Yes, ma'am.

Q. So for the Test of that day you know that the next day you are going to go to the gun show?

A. It was late that night when he told me that he was—It was late. It was real late that night.

Q. So you weren't just waking up in the morning. This was late at night?

A. Yes, ma'am.

Q. So it is late at night on Friday night?

A. Yes, ma'am.

Q. And so you go back to sleep for the rest of the evening. [638] Is that a yes?

A. Yes, ma'am.

Q. And Pacman spends the night in the apartment?

A. Yes, ma'am.

Q. The girls are in the apartment?

A. Yes, ma'am.

Q. You wake up the next morning. Is that correct?

A. Yes, ma'am.

Q. You don't go immediately to the gun show.

A. No, ma'am.

Q. In fact, you don't buy your first gun until 3:00 in the afternoon.

A. I don't know what time it was.

Q. Do you remember it was the afternoon?

A. Yeah.

Q. So for that whole morning you know you are getting ready to go to the gun show to buy guns?

A. It was about an hour after he woke me up that we left.

Q. Okay. So you slept until about 2:00?

A. Yeah. I don't know for sure what time it was.

Q. So you didn't get up and go back to sleep. You just slept through to 2:00 on Saturday?

A. Yeah; because it was real late that night.

Q. All these friends that Pacman has around the apartment during this period of time, they are his friends or family [639] members?

A. Yes, ma'am,

Q. Except for A.D. who is Ve'Queshia's boyfriend?

A. Yes, ma'am.

Q. And A.D. is about 18 years old, or 17 at the time?

A. He was 17.

Q. And at the time Ve'Queshia was 14?

A. She was 15.

Q. Fifteen?

A. Yes, ma'am.

Q. And A.D. was over at the apartment a lot?

A. Every now and then.

Q. Every now and then, every other day?

A. No; he wasn't over that much.

Q. He didn't go to school with her?

A. No, ma'am. He went to another school.

Q. So the only time they would see each other is when he would come over?

A. Sometimes he came over on weekends, but most of the time he just called her all the time.

Q. You had a problem with Ve'Queshia leaving school during the day, didn't you?

A. Yes, ma'am.

Q. In fact, Ve'Queshia would disappear from the school grounds—

[640] MR. JETT: Objection. This is not relevant.

THE COURT: Overruled. Go ahead.

MS. HEATH: Q. Would she not?

THE WITNESS: A. Yee, ma'am.

Q. And was that from Bryan Adams or from the Lake Highlands School?

A. It was at Bryan Adams.

Q. Is that a school she went to in December of 2002?

A. Yes, ma' am

Q. There would be times you would go by to pick her up and she wouldn't be there?

A. That happened once.

Q. And you called Ted Dixon concerned about Ve'Queshia's disappearance?

A. No, I didn't call Ted. I had told Ted about it, but I didn't call Ted.

Q. And you were concerned about the fact that she was disappearing from the school grounds?

A. Yes, ma'am.

Q. When you moved into the Forest Springs address, you moved her into a new school?

A. Yes, ma'am.

Q. She left Bryan Adams High School in December of 2002?

A. Yes, ma'am.

Q. And she moved into Lake Highlands High School?

[641] A. Yes, ma'am.

Q. In January of 2003?

A. Yes, ma'am.

Q. And as far as you know, in Lake Highlands High School she did not have an attendance problem?

A. No, ma'am, she didn't.

Q. She went to school everyday when she was supposed to go to school?

A. Yes, ma'am

Q. In fact, she was a pretty good student when she would go to school.

A. Yes, ma'am,

Q. And the other girls you didn't have an attendance problem with?

A. No, ma'am.

Q. They would go to school when they were supposed to?

A. Yes, ma'am.

Q. Now, as we get to January 4th, that Saturday of the gun show, you wake up about 2:00 in the afternoon or so.

A. Yes, ma'am.

Q. And you are told you are going to go to the gun show?

A. Yes, ma'am.

Q. You go in a car with Pacman's sister?

A. We went—I went up to the store and then got in the car with Pacman because he was seeing Hookie and Tyshon somewhere [642] else in my car.

Q. But you drove to the gun show with Farrah (phonetic) Pooler?

A. No. We was in the same car together.

Q. And Pacman went with Hookie, Cory Sanders, to the gun show in another girl's car, somebody else's car?

A. No, ma'am.

Q. And to get to the gun show it is what? About 20 minutes, a 30-minute drive?

A. I am not for sure how far it was.

Q. You arrive at the gun show?

A. Yes, ma'am.

Q. And there is two separate cars that arrive?

A. No, ma'am.

Q. So all five of you were in one car?

A. Yes, ma'am.

Q. You say Tyshon went to the gun show with you. Isn't it true that it was only you, Farrah Pooler, Pacman—

A. Tyshon and Hookie.

Q. And Hookie?

A. Yes, ma'am.

Q. Not Tyshon?

A. Yes, ma'am; Tyshon went.

Q. But all of you did not come in the same car?

A. I was in the car with Pacman, because we left my apartment.

[643] Q. Ma'am, the question was were all of you in the same car?

A. We weren't all in the same car.

Q. So there is at least another car?

A. Yes, ma'am.

Q. So at least two cars, if not more, arrive at the gun show?

A. It was two.

Q. So there are two cars that arrive at the gun show?

A. Yes, ma'am.

Q. So you arrive at the gun show and you have to pay money to go in?

A. Yes, ma'am.

Q. So everybody pays money to go in?

A. No. Hookie paid for everybody to go in.

Q. Money was paid for everybody to attend the gun show?

A. Yes, ma'am.

Q. And in the gun show there is a lot of security officers there, is there not?

A. I saw some.

Q. At no point during the gun show did you in public go to any of the security officers and explain to them that you were having a problem.

A. No, ma'am.

Q. You never went up to them and said, "This man has held a gun to my head and he is forcing me to do things."

A. No, ma'am.

[644] Q. You never went to a security person or police officer in the gun show and said, "Please send a police vehicle to my apartment to get my girls."

A. No, ma'am.

Q. At this point your girls were in the apartment by themselves.

A. No, ma'am.

Q. Do you remember Joycelyn's testimony yesterday that it was just the girls in the apartment by themselves, and I think one of them had a friend from school, but it was just the girls?

A. We are talking about January the 4th. Right?

Q. Correct. The very first—

A. His cousin Tony was there also.

Q. Do you remember Joycelyn's testimony saying—

A. Yes, I remember Joycelyn's testimony.

Q. Saying it was just the girl's there?

A. I remember her testimony.

Q. Now, the first gun you buy, you go up to the booth and you are telling the jury that you did fill out the application?

A. Yes, ma'am.

Q. And if we could put No. 20-A up on the screen, the first page. And that is your signature on it?

A. Yes, ma'am.

Q. So you are not denying that that is your signature?

A. No, ma'am.

[645] Q. No. 20-A is shown on the screen, is that your signature?

A. Yes, ma'am.

Q. And if we could go to the top. That is your name and your handwriting. You filled all that out?

A. Yes, ma'am.

Q. Were you living on Skillman Avenue at the time?

A. No, ma'am.

Q. So is that a lie where your residence is?

A. Yeah. T wasn't living there at the time I filled out the form.

Q. So was that a lie?

A. Yes.

Q. You were not living on Skillman?

A. No, I wasn't.

Q. If we can scroll down to the questions. In case you cannot read the screen, let me show you Government's Exhibit No. 20-A, and ask you, the very first question, would you read that to the jury, please?

A. "Are you the actual buyer of the firearms listed on this form?"

Q. And were you the actual buyer of the firearms listed on that form?

A. No.

Q. Was that gun supposed to be for you?

A. No, ma'am.

[646] Q. Did you lie on that form by putting "yes"?

A. Yes, ma'am.

Q. What was the next question?

A. "Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?"

Q. And were you under indictment at that time?

A. Yes, I was.

Q. Did you know you were under indictment at the time?

A. Yes, ma'am.

Q. When you put "no" down there, was it a lie?

A. Yes, ma'am.

Q. So on each of these forms when you were buying guns, did you answer the questions the same way that yes, you were buying the guns for yourself?

A. Yes, ma'am; I answered that way.

Q. And you understood that the gun dealer wanted you to answer the questions truthfully.

A. Yes, ma'am.

Q. In fact, you swore at the bottom on your signature that you would answer those questions truthfully?

A. Yes, ma'am.

Q. Did you know that it was a crime for you to buy that gun for you to receive that gun?

A. Yes, ma'am.

[647] Q. There is no question in your mind that you knew that you were committing a crime by buying that gun?

A. I knew I was.

Q. And for each gun after that, did you know that you were committing a crime by buying that gun?

A. Yes, ma'am.

Q. Now, in preparation for trial, you have had an opportunity to talk to Doctor Coons. Is that correct?

A. Yes, ma'am.

Q. And do you recall telling him the story that you just told the grand jury earlier about—

MR. JETT: Excuse me, Judge, in reference to a grand

MS. HEATH: Q. To the jury here. Do you recall telling him the same story you just told the jury here about going to the first gun dealer and saying, "I am under indictment. I am in the court system"?

A. I did tell the first gun dealer that I was—I didn't say I was under indictment, but I did say I was in the court system. And he asked me had I been sentenced yet, and I said no. And he said he was going to run it through and see what happened.

Q. So he didn't come back to this form and say, "But excuse me, Ms. Ashford. You answered on this form that you are not under indictment. Are you really under indictment?"

[648] A. He didn't say that. He didn't say that.

Q. He just gave you a wink and said, "Let's run it through and see if you, a person under indictment, can get this gun"?

A. He asked me had I been sentenced yet, and I told him no, and he said he was going to run it through and see what it comes up as.

Q. And when it ran through and you got the gun, you were surprised?

A. Yes, I was.

Q. Do you recall telling Doctor Coons, "In my mind I hadn't done anything wrong then"?

A. Because it made me feel like I hadn't done it wrong when I knew I wasn't supposed to be getting any guns. I knew I wasn't supposed to be able to get them.

Q. But do you recall telling Doctor Coons that in your mind, which is what the jury needs to hear about what you were thinking, in your mind you had not done anything wrong by buying that firearm.

A. I knew I had did something wrong. I knew I wasn't supposed to have been able to do it. I didn't want to do it.

Q. So you knew you had done something wrong?

A. Yes, ma'am.

Q. So when you talk to Doctor Coons—Excuse me. Let me finish the question. When you talked to Doctor Coons, you lied to him when you told him, "In my mind I hadn't done anything [649] wrong"?

A. I said I didn't feel like I had done anything wrong because it came back approved.

Q. After that you gave the—you finished the transaction and gave the money to the dealer?

A. Yes, ma'am.

Q. And you got the gun?

A. Yes, ma'am.

Q. And then you walk around and look at some more guns?

A. Yes, ma'am.

Q. And everybody with you, they are looking at guns also?

A. Yes, ma'am.

Q. And you go to a second dealer and that is where you buy the Intratec gun with the laser?

A. Yes, ma'am.

Q. The laser pointer we have heard so much about?

A. Yes, ma'am.

Q. And that was later in that afternoon?

A. Yes, ma'am.

Q. Do you recall approximately how long you spent at the gun show that day?

A. I don't know—No, ma'am.

Q. Did it seem like a couple of hours?

A. It could have been; yes.

Q. Was there a lot of wandering around and looking at [650] different places?

A. Yes, ma'am.

Q. And they are picking up guns and looking at them?

A. Yes, ma'am.

Q. You are picking up guns and looking at them?

A. I didn't pick up any guns. I wasn't interested in gun.

Q. The guns you bought you picked up?

A. Yeah, cause—Yes, ma'am. Yes.

Q. At the conclusion of the gun show after you have been there for a couple of hours, all of you decide to leave.

A. Yes, ma'am.

Q. The first show they checked your bags; they check your bags as you are leaving also?

A. At the first show they wasn't doing that. They was handing the little locks for the guns. As you are walking out the door they just made sure you had a receipt in your hand as you was walking out with it.

Q. So those little locks we saw earlier introduced into evidence were things you got at the first gun show?

A. Yes, ma'am.

Q. Now, driving home you and Farrah Pooler go in one car.

A. No. We split up. When we got I think it is like west Dallas, they was going somewhere else, and they pulled up to a McDonald's. And it wasn't too far from Lew. Sterrett they pulled up to McDonald's, and they said they was going to follow [651] us up. And I got up in my car and Farrah got in my car with me and we went to my apartment.

Q. Did you drop Farrah off at home?

A. No. she was there.

Q. When you got to your apartment you had Farrah with you?

A. Yes, ma'am.

Q. And your girls were at home?

A. Yes, ma'am.

Q. Nobody else was with them at that time?

A. I don't remember which one, who asked, whether it was Tony that said he had just walked up to the store, he had walked to the corner store.

Q. Do you remember Joycelyn's testimony yesterday that when you arrived home you arrived home alone, and that it was just the girls at home?

A. I remember something like that.

Q. Do you remember Joycelyn saying that later that evening everybody else came over, Farrah came over, Farrah Pooler came over, Pacman came over? Do you remember her testimony yesterday?

A. I remember her saying it, but I think she got confused on the times and places.

Q. Saturday night everybody comes over to the house—Pacman, Farrah Pooler?

A. We was all there.

[652] Q. When you say "we," who are "we"?

A. It was me, the kids, Pacman, Farrah, Hookie, Tyshon, Tony, T.K. came by and left. I think that is it.

Q. You heard some of the names I had asked both Joycelyn and Ve'Queshia about yesterday. Is that a yes?

A. Yes, ma'am.

Q. Pacman was in his early 20s. Isn't that correct?

A. Yes, ma'am.

Q. In fact, when you met him he was 20.

A. He had lied to me about his age when I first met him.

Q. The question was he was 20 when you first met him.

A. Yes, ma'am.

Q. Because you found out that he turned 21?

A. Yes, ma'am.

Q. In fact, he turned 21 in February?

A. Yes, ma'am.

Q. Tyshon is in his early 20s as well?

A. Yes, ma'am.

Q. Cory Sanders is in his early 20s—Hookie?

A. Yes, ma'am.

Q. T.K. is a little older; maybe in his late 20s?

A. I never knew T.K.'s age.

Q. Another person that came by the house was E.

A. Yes, ma'am.
Q. E was also young, in his 20s?
[653] A. He was somewhere around there; yes.
Q. Little Half would have come by.
A. Yes, ma'am.
Q. And he also was in his 20s?
A. I didn't know Half's age.
Q. You said A.D. was 17?
A. Yes, ma'am.
Q. Do you know A.D.'s full name?
A. No, ma'am.
Q. Do you know A.D.'s first name?
A. All I ever knew him as was just A.D.
Q. A.D.?
A. Yes, ma'am.
Q. What is A.D.'s parents' names?
A. I don't know his parents, name.
Q. Where does A.D. live?
A. Off of—It was off of 635 and Kingsley.
Q. Capone would come by the apartment?
A. Yes, ma'am.
Q. And Capone was also in his 20s?
A. I didn't know his age.
Q. Was he young like the rest of them?
A. He seemed older than them.
Q. Casper would come by.
A. Yes, ma'am.
[654] Q. And T.K.
A. Yes, ma'am.
Q. Do you know T.K.'s full name?
A. No, ma'am.
Q. Do you know his real first name?
A. I know him as T.K.
Q. Was other people also coming by your apartment that you did not know their names, other friends of Pacman or friends of these individuals?

A. Yes, ma'am.

Q. You mentioned during the time that Pacman was with you that he was not employed?

A. No, ma'am.

Q. So August, September, October, November, December, January, he had no job?

A. No, ma'am.

Q. He was making money, though, in some fashion?

A. When I first met him he told me he had a job, but I found out later that he didn't.

Q. But he was still making money. He would bring money home?

A. Yeah, he would have money.

Q. And he and his friends would have money?

A. Yes, ma'am.

Q. And they would have some money that was not your money?

A. Yes, ma'am.

[655] Q. On occasion he would get your money?

A. Yes, ma'am.

Q. But he had other money, so he wasn't just living off your money.

A. Practically every time that Pacman came I gave Pacman money.

Q. That wasn't the question. Pacman had his own money, so he wasn't just living off your money?

A. Sometimes.

Q. Would you be surprised to know that the value of the guns that were purchased at the two gun shows was about $1500?

MR. JETT: Objection. It is not in evidence, and she is making a statement rather than asking a question.

THE COURT: The relevance of that is?

MS. HEATH: We are just talking about money. She talked about the financial problems she had had earlier, so I was showing one of the expenses that they had.

THE COURT: All right. Go ahead.

MS. HEATH: Q. Would you be surprised to find out that the value of the guns over the two gun shows was about $1500?

MR. JETT: Excuse me. The form of the question is my objection. She is making a statement. She is not asking a question.

THE COURT: She is asking a question—"are you [656] surprised?"

MR. JETT: It is assuming facts not in evidence.

THE COURT: Overrule the objection, counsel. Go ahead.

THE WITNESS: A. I didn't know that.

MS. HEATH: Q. And as of the time you were fired from Stone way, the daycare center, you had no regular income coming in from a job.

A. No, ma'am.

Q. You had child support coming in from Ted Dixon.

A. Yes, ma'am; and Harold Humphrey.

Q. And that is Ve'Queshia's father?

A. Yes, ma'am.

Q. You still had to pay rent to the apartment complex, did you not?

A. Yes, ma'am.

Q. In fact, you had some problems with getting repairs done at that apartment complex.

A. Yes, ma'am.

Q. And you would have to go over to the manager's office to kind of make sure that they would get done?

A. I called the manager's office.

Q. And you would also go to the manager's office?

A. No. I talked to the lady on the phone.

Q. So you never went over to the office?

[657] A. I went to the office one time and it was about my rent.

Q. Did you have a discussion with the manager about whether or not you were going to be able to stay in the apartment?

A. Yes, ma'am.

Q. Okay. At some time did the apartment complex at Forest springs indicate that you needed to move out?

A. Yes, ma'am.

Q. Because there was too much traffic in your house; too many people coming and going?

MR. JETT: Objection. It is hearsay. She wouldn't know why. It is speculation.

THE COURT: Well, overruled. She may answer. If she knows she can answer.

MR. JETT: And it would be based on hearsay, Your Honor.

THE COURT: Overrule the objection.

THE WITNESS: A. She didn't tell me that. That is not what she told me.

MS. HEATH: Q. Did she tell you it was because of the shot through your window in your apartment?

A. Yea, ma'am.

Q. And that was a shot coming out of your apartment?

A. Yes, ma'am.

Q. And that was the back door, the sliding glass door?

A. It is the sliding glass door. It is in the front of the [658] apartment.

Q. And this was in January 2003 when all this was happening?

A. Yes, ma'am.

Q. Pacman wasn't the only one prior to the gun shows that had a gun around the apartment.

A. No, ma'am.

Q. You saw some other people that had guns on occasion.

A. Yeah.

MR. JETT: What time frame is she talking about?

MS. HEATH: Q. In January 2003 just prior to the gun shows.

THE WITNESS: A. Yeah. They had guns. Me and Tyshon pulled up one day from the store, and they was out there into it, and they had guns. And the guys they was into it with had gun.

Q. Is there pointing of guns going on?

A. They had guns in their hands, and some of them had guns, like they have them like stuck there. They had them there.

Q. Stuck there, stuck in tic waistband of the pants in the front?

A. Yes, ma'am.

Q. And Pacman also had a shotgun that he had at the apartment for a while in January 2003.

A. No. I found it there before that.

Q. Okay. The shotgun shells that were shown to the jury [659] earlier, that came from Pacman's shotgun?

A. Yes, ma'am.

Q. So the shotgun you knew about prior to the gun shows?

A. Yeah. I had found it.

Q. And you knew about Pacman carrying a gun prior to the gun shows, because he put it to your head?

A. Yes, ma'am.

Q. And you knew that other people like Tyshon carried a gun on occasion, because you saw them getting into it?

A. Yeah. That was in January; yeah.

Q. And you know as a mother that that .s not a good surrounding to have your kids in.

A. Yes, ma'am.

Q. You knew from your relationship with Ted Dixon you didn't want them in a relationship where you are being abused?

A. Yes, ma'am.

Q. And you didn't want them in a relationship where they are being abused?

A. Yes, ma'am.

Q. And you didn't want them in a relationship or around people that had guns?

A. Yes, ma'am; I didn't.

Q. Or around young juvenile males that didn't work?

A. Yes, ma'am.

Q. That just hung out all day?

[660] A. Yes, ma'am.

Q. And you knew some of these people had problems with the police?

A. I heard them talking about it.

Q. And that is not a good environment to have your girls in?

A. No, ma'am.

Q. So prior to the gun shows, you never called your mom to say, "Mom, we need help. We need to get out of this situation"?

A. No, ma'am.

Q. You never called your stepfather to say, "Dad, we need to get out of this situations"?

A. No, ma'am.

Q. Never called your real father saying you need to get out of the situation?

A. No, ma'am.

Q. You never called Ted Dixon and said, "Ted, I am having problems again in my relationship. I need help. I need to get out."

A. No, ma'am.

Q. You never packed the girls up in the car and took off?

A. No, ma'am.

Q. Even when your girls at Christmas time were over with your mom and your stepfather in Greenville, you never said, "Could you keep them there for a while so they will be safe? I am [661] having some problems. Let me resolve it without them here." You never told your parents that, did you?

A. I didn't tell my mom exactly the way you put it. I had told my mother once that when we was talking about me doing time, I had told my mother once that I may just send the girls on down there before time. And she asked me what was going on, and I told her I couldn't talk about it.

Q. So you had an occasion when it was brought up, but you wouldn't talk about it?

A. I was afraid to.

Q. And over the Christmas holidays when your parents had the girls safe and sound, you didn't decide then to tell them, "Please keep the girls. Do not send them back"?

A. No, ma'am.

Q. Looking back on it, don't you think that would have been the best thing to do?

A. I realize that now.

Q. Would you agree that you were negligent for letting them come back into the situation?

A. Yes, ma'am.

Q. Would you agree that you were negligent for allowing Pacman back into your life, knowing that he was abusive prior to that?

A. Yes, ma'am.

Q. Do you agree that you were negligent for not calling the [662] police on him?

A. Yes, ma'am.

Q. Do you see that you had options?

A. But I was afraid, Ms. Heath. I didn't know what to do.

Q. But did you see that you had options?

A. Yes.

Q. And did you see for a period of time your daughters were sate with their grandparents?

A. Yes.

Q. In fact, after the second qun show, which we will talk about in a minute, but after the second gun show, you do call the police.

A. I didn't call—I wasn't the one that called the police.

Q. You had an argument with—Was it T.K.?

A. It was T.K., and Queshia was on the phone with Farrah, and she had Farrah, Farrah gave her the address—Queshia gave Farrah the address and Farrah sent the police over there.

Q. So Farrah on your behalf called the police because there was a problem at your apartment?

A. She didn't like T.K. because her and T.K. had got into it before.

Q. So because we don't like T.K., we decide to call the police on him?

A. Yes, ma'am.

Q. The police come out. Is that correct?

[663] A. Yes, ma'am.

Q. Pacman is not there that day, is he, or not at that time?

A. He wasn't there at the time me and T.K. got into it.

Q. So Pacman was gone at this point?

A. Yes.

Q. And this is after the second gun show. Hs is out and about.

A. I am not for sure if it was the second gun show or before, but I remember the incident.

Q. So the police arrive?

A. Yes.

Q. And when people know in the apartment that the police are coming, some of them leave, like A.D.

A. A.D. did; yea. A.D. did.

Q. He took off?

A. Yeah.

Q. He took his nine millimeter gun with him?

A. I don't know what happened about that.

Q. You remember talk about that in the apartment afterwards, that he threw his gun away and that the other guys wanted to go find it.

MR. JETT: Excuse me, Judge. Now she is asking about hearsay. We object.

THE COURT: Sustained,

MS. HEATH: Q. So the police come to the apartment?

[664] THE WITNESS: A. Yes, ma'am.

Q. They talk to you?

A. Yes, ma'am.

Q. Who else did they talk to in the apartment?

A. They talked to Half.

Q. Little Half?

A. Yeah. And—

Q. Did T. K. stay around?

A. T.K. was gone way before that.

Q. So he took off?

A. Yeah.

Q. Here you have the police at your apartment. Do you say, "Thank God you are here. I am having problems with this man Pacman, and he is holding guns to my head and making me buy other guns"?

A. No, ma'am. They already told me what to say when they saw the cops out there.

Q. Did you see—Not just one police officer arrived. Is that correct? There were several?

A. There was only one that came in. Just one came in.

Q. But there were more outside?

A. I didn't ever look out there.

Q. And the policeman, when he came in he had a gun?

A. Yes, he did.

Q. And you didn't say, "They have been beating me. Look at [665] the bruises on my arms and my shoulders and my back."

A. No, I didn't.

Q. You didn't say, "They have been pointing lasers at my head and threatening to shoot me"?

A. No, I didn't.

Q. You didn't say, "They have been trying to kill me"?

A. No, I didn't,

Q. Do you see that you had an opportunity then to make a report?

A. I see that now.

Q. You had a phone in your apartment, did you not?

A. Yes, ma'am.

Q. That phone was paid for? It was working?

A. Yeah.

Q. It was never a period of time in December or January when it was out of service?

A. No, it wasn't.

Q. You could have picked up the phone at any point, could you not?

A. Every time I used the phone somebody would pick a phone up in the back room, or it somebody called for me they asked them who is it, what they want. I hardly ever got phone calls.

Q. The question was you could have picked the phone up, could you not?

A. Yeah, but they would have heard me on the phone.

[666] Q. Okay. Whether they heard you or saw you, could you have picked the phone up and dialed 9-1-1?

A. I was afraid. I wasn't thinking like that.

Q. During the week between the two gun shows from Saturday to Saturday, your girls are in school.

A. Yeah.

Q. Monday. Yes?

A. Yes.

Q. They are in school Tuesday?

A. Yes.

Q. They are in school Wednesday?

A. Yes.

Q. They are in school Thursday?

A. Yes.

Q. They are in school Friday?

A. Yes.

Q. Did you pick up the phone any of those days and call the police and say, "Please send a police car to the different schools my girls go to and make sure they are safe. I am having a problem with a man pointing a gun at me"?

A. I didn't think like that.

Q. Do you see that you had an option to do that?

A. Yes.

Q. That your girls were safe at school at that point?

A. I see that now.

[667] Q. Were you negligent for not calling the police each and every one of those days?

A. Yes.

Q. You mentioned in January that you were also going to church, but you would have Rookie come with you?

A. Yeah, he would come with me.

Q. So the Sunday after the gun show you would go to church, but Hookie was there with you?

A. Yes.

Q. So after the first gun show you go to church with Hookie?

A. Yes.

Q. Okay. So that Sunday you are in church, and I assume you and your girls and Hookie are not the only people in church.

A. No, we are not.

Q. It is a full church?

A. Yes.

Q. After the holidays everybody likes to go to church a little more. It is usually more crowded.

A. Yes.

Q, So you have a lot of people in church?

A. Yes.

Q. And what church do you go to?

A. Full Gospel.

Q. You have a minister or a priest?

A. A minister, a preacher,

[668] Q. A preacher? While you are in church do you tell anybody, "We are having problems at home. Please help me and my girls"?

A. No, I didn't.

Q. Rookie didn't take a gun into church with him.

A. Not that I know of.

Q. You have all of these people around you in church on Sunday, and you do not try to protect your girls.

A. T was trying to protect my girls. I was trying my best to keep anything from happening to us.

Q. Did you tell anybody in church, any one of those people sitting around you in church?

A. No., I didn't.

Q. So were you doing the best you could to protect your girls?

A. I thought I was.

Q. Were you doing the best you could by not telling people, by not reporting it?

A. No.

Q. Did you put them at risk because you would not tell anybody else?

A. Yes.

Q. Now, at both these gun shows, each time that you fill out a form you are telling the jury you knew you were committing a crime?

A. Yes, ma'am.

Q. But you know that at the gun show Pacman is not going to [669] shoot you. You know that?

A. I didn't know what his mind was. All I know is what he told me.

Q. But you told the jury earlier—

A. I didn't feel like he would shoot me in front of a lot of people, but I still didn't know where his mind was.

Q. You told the jury you knew he wasn't going to kill you right then; it would be later that he would, abuse you.

A. Yes, I said that.

Q. So you knew nothing was going to happen immediately.

A. No, I didn't—No, I didn't think it was going to happen right then and there.

Q. each time you filled out the information on the form, you knew from the way the form was worded that you would not be able to get a gun if you indicated you were under indictment. You knew that.

A. Actually I had never seen a form until that first gun show.

Q. And when you answered the first question, doesn't it say on that first question in bold type—And if we could put No. 20-A back on the screen.

MR. JETT: Judge, this has been asked and answered. She already said she knew what was on the form and she knew it wasn't true what she said.

THE COURT: All right. Overruled. Go ahead. She may ask.

[670] MS. HEATH: Q. And if we could focus on the very first question. The second question; I am sorry. I am sorry;

the first question. Do you see the warning there? And if you have the original form in front of you, it says, "You are not the actual buyer if you are acquiring the firearm on behalf of another person." Do you see that?

THE WITNESS: A. Yes.

Q. Do you see it also says, "If you are not the actual buyer, the dealer cannot transfer the firearm to you." Do you see that?

A. Yes.

Q. If you are not the actual buyer he can't give you that gun. Do you see that?

A. Yes.

Q. Did you tell the jury earlier you didn't want to buy guns?

A. No, I didn't want guns.

Q. If you had answered "no" here, you couldn't have gotten a gun. Do you see that?

A. Yes, ma'am.

Q. You could have avoided getting the gun and committing a crime by putting "no" there,

A. I was told to put "yes." I was told to put "yes." That is why I put "yes" there.

Q. Did you write "help me" on the form?

A. No.

[671] Q. "I am being threatened"?

A. No.

Q. Did you try to tell any of the gun dealers that you were being threatened to buy these guns?

A. No, I didn't.

Q. Did you ask any of the gun dealers, "Hey, can I borrow your cell phone for a minute so I can make a call?"

A. No.

Q. Did you attempt to go to use a phone there while you were there?

A. No.

Q. You mentioned that during the first gun show there was a period of time when—No, during the second gun show where Pacman went off with the Hispanic men, or one of the men?

A. They stepped up as if they didn't want us to hear what they was talking about, and me and A.D. and the other Hispanic guy wasn't too far behind them. They just walked up a little piece, and they was whispering and talking.

Q. You mentioned at the second gun show that the very first gun you bought was for A.D. This was the Mesquite—

A. Yeah. Because I heard him say that is the one he want, so I knew that. That is why I said that.

Q. Prior to that day had you seen A.D. with a gun?

A. No.

Q. So you go ahead and buy the gun that A.D. wants.

[672] A. Yeah.

Q. You fill out the form?

A. Yes.

Q. Had you met the Mexican people by then, the Hispanic people by then?

A. No.

Q. So it wasn't until you left that table that you saw the Hispanic people?

A. Yes. That is the first time I ever saw them.

Q. And then you buy guns for them after that. Is that correct?

A. I didn't know I was buying guns—I didn't know I was buying guns for them until after the fact. It is when I realized when I saw Pacman give them the box.

Q. How many guns did you buy that ended up in their hands?

A. Two.

Q. And where did you buy those guns—at two separate dealers?

A. Yes, ma'am.

Q. And were those separate transactions from that first one, from A.D.'s gun?

A. Yeah. One of those went to them from A.D.'s gun; yes. The same dealer where A.D.'s gun came from, one of those guns came from there.

Q. So when you bought A.D.'s gun you had two guns.

A. We went back, and I was going to fill out another form [673] and the guy told me I didn't have to; he put it on the same form.

Q. So you got two guns from the same dealer?

A. Yes, ma'am.

Q. And you found out later that that gun went to the Mexican people that were there?

A. Yes, ma'am.

Q. And there were two gentlemen that was there?

A. There was two Hispanics there.

Q. And there are two people Pacruan seemed to know?

A. Yes, ma'am.

Q. Now, the second gun show you arrived there after lunch sometime early afternoon?

A. I don't know what time it was we got there.

Q. It wasn't the morning?

A. No, it wasn't morning.

Q. And you stay at this gun show tor a couple of hours also?

A. Something like that; yes.

Q. Are you wandering around looking at other guns when you are not buying a gun?

A. Yes, ma'am.

THE COURT: Ms. Heath, you have covered when she was at the gun show before.

MS. HEATH: This was the second gun show. We haven't talked about that.

[674] THE COURT: You are not now—You haven't asked her about the second gun show before?

MS. HEATH: No. I talked about the first gun show before.

THE COURT: My mistake. I thought you asked her about it.

MS. HEATH: Q. And at the second gun show, you are able to buy three Guns—I am sorry; four guns. But you are denied on one?

THE WITNESS: A. Yeah. It was four.

Q. And the dealer that denies you or delays the purchase of that gun, you had an argument with him?

A. I wasn't really arguing with him.
Q. You were irritated that you could not get that gun?
A. I wasn't irritated.

THE COURT: You have asked about this, Ms. Heath. You talked about that on that social security issue. Have you not asked her about the social security issue before?

MS. HEATH: I have not, Your Honor.

THE COURT: All right.

MS. HEATH: Q. You were irritated with this particular gun dealer because he did not give you a firearm?

THE WITNESS: A. No, that is not why I was irritated.

Q. And you told him you just bought a firearm from somebody [675] else?

A. That is what Pacman told me to tell him.
Q. My question to you was you told the gun dealer that you had just bought a gun from another dealer?
A. Yes, I did tell him that, but I wasn't irritated because he wasn't selling it to me.
Q. And you came back to him with the number?
A. Because he told me to go get it from the other dealer, and I went over and got it.

Q. The question isn't what Pacman told you. You came back to that dealer with a number?

A. Yes, I did.

Q. And that still did not get you the gun?

A. No, ma'am.

Q. And you were irritated at this point because you could not get the money back.

A. After a while I went over there to get the number, and I was talking to the other dealer that had sold the gun and he was getting the forms so he could get the number off the form. And Pacman told me that if he lose his money I had a price to pay.

Q. Again, my question to you is what you told the gun dealer. You were upset with the gun dealer. You told him, you know, "You are keeping my money. That is not right."

A. Yeah. He told me to tell him that.

[676] Q. Again that wasn't my question. Did you tell the gun dealer—

MR. JETT: Excuse me, Judge. She answered the question. She said she told the gun dealer that because that is what Pacman told her to say. She answered the question.

THE COURT: It was unresponsive, but go ahead and ask your question.

MS. HEATH: Q. Did you tell the gun dealer, "You are keeping my money and that is not fair"?

A. Yes.

Q. "That is not right"?

A. Yes.

Q. And did he explain to you that there is a sign up and that is the policy?

A. I didn't say he was keeping my money. F told him, I asked him why was they keeping money, and he explained it to me,

Q. So you asked him why he was keeping the money?

A. Yes. I didn't say he was keeping my money. I didn't say that.

Q. You indicated that during the week between the gun shows the abuse got worse?

A. Yes, ma'am.

Q. And the girls were aware of some of the abuse, whether they heard it or they saw it?

A. Yes, ma'am.

[677] Q. And at no point did you try to get your girls to help you by going to school and telling anybody at school?

A. No, ma'am, I didn't.

Q. And you didn't tell any of the girls, "When you get to school, call grandma and tell her to come get you from school"?

A. No, ma'am, I didn't.

MR. JETT: This has really been asked and answered. She has gone over it time and time again. She didn't call people. It is repetitive. We object.

THE COURT: Well, I think she is asking about a specific time frame here. Go ahead.

MS. HEATH: Q. And each day your girls went to school you didn't tell them, "Call your grandfathers, one of them"?

THE WITNESS: A. No, ma'am.

Q. And tell them to come pick you up?

MR. JETT: Can we hear about: what time frame, because before she went "Monday, Tuesday, Wednesday," so we—

THE COURT: She is asking about that week.

MS. HEATH: The week between the gun shows.

THE COURT: That is what she is asking about.

MS. HEATH: Q. And you didn't tell your girls to report it to any teachers or counselors or the security people at their school?

THE WITNESS: A. No, ma'am.

[678] Q. Now, when you registered Ve'Queshia at Bryan Adams in August of 2002, do you recall putting on the form that Pacman was going to be the emergency contact?

A. I don't think that is why his name got put on there.

Q. Okay. Let me show you an application, the first page. That appears to bear your signature. Do you see that?

A. Yes.

Q. And it has some handwriting up here with some personal information about you—your name, social security number. Do you see that?

A. Yes.

Q. That is your handwriting, isn't it?

A. Yes, it is.

Q. And do you see "In case of emergency contact"? Do you see that?

A. Yes.

Q. Do you see the name Thomas Wright, and in parentheses Pacman?

A. Yes. I did that.

Q. With a phone number for emergency contact?

A. Yes.

Q. And you mentioned earlier that you didn't know anything about Peavy Road, Do you recall that?

A. Yeah.

Q. Do you see your address on this form as living on Peavy [679] Road?

A. That is a girlfriend of mine's address.

Q. So when you told the jury earlier you didn't know anything about an address on Peavy Road, that is not true?

A. I didn't remember it then.Q

Q. Was that a lie that you were living on Peavy Road at that time in September of 2002?

A. That is when I was in the process of moving, and I let Queshia and them stay in the same school until I got settled.

Q. So you just used this address to help keep them in school?

A. Yes.

Q. So that is a lie. You were not living at that address.

A. No.

Q. And do you recall going up to the school to sign the papers to have her transferred in December of 2002?

A. Yes, I did.

Q. So you would have to go up to the school to sign the paperwork and have her transferred to Lake Highlands?

A. Yes, ma'am.

Q. And do you recall going to Lake Highlands school to have her enrolled there and filling out the forms?

A. Yes, ma'am.

Q. And do you recall at that school also putting down that you had emergency contact of Thomas Wright, Pacman?

A. I think the papers just transferred.

[680] Q. Now, in February you were arrested for the guns.

A. Yes, ma'am.

Q. And you were told you were arrested for the guns, for purchasing these guns?

A. Yes, ma'am.

Q. And you told the officers you had three guns at the location?

A. I told them that there was three guns. T said there were three guns there.

Q. And this was in the morning on February 3rd, 2003?

A. Yes, ma'am.

Q. And it wasn't until that afternoon that you actually had your hearing before the Judge?

A. Yes, ma'am.

Q. And you had some family members that came up during that day. Isn't that correct?

A. They showed up right before court.

Q. And who came for court?

A. My mother, I think my uncle was with her, and Queshia was with me.

Q. And you now know from this trial that no guns were found at your apartment.

A. Yes, ma'am.

Q. On February 3rd, 2003 you went to jail. You haven't been out since?

[681] A. No, ma'am, I haven't.

Q. You are now separated from Pacman?

A. Yes, ma'am.

Q. He is out of your life?

A. Yes, ma'am.

Q. Did that arrest help to get him out of your life?

A. Yes, ma'am.

Q. Did you attempt to make any contact with him after that?

A. Yes, I did.

Q. And why was that?

A. I called and told him that I won; that I ain't got to worry about him messing with me anymore. I had my sister call and I told him that.

Q. So you called him right after you got in jail and said you had won?

A. Yes, I told him that.

Q. Because you knew your mom had the kids now and you you were safe?

A. Yes, I did.

Q. So you never wanted to see him again?

A. No, ma'am.

Q. Didn't want him in your life anymore?

A. No, ma'am, I didn't.

Q. Then why did you put him down on your visitation list in the jail? Why is Thomas Wright on your visitation list?

[682] A. I don't remember putting him on my visitation list.

Q. You wanted him to come visit you, didn't you? Ms. Dixon, let me show you another document bearing your signature. Is that your signature?

A. It is my signature.

Q. Is that your handwriting?

A. Yes, it is my handwriting.

Q. You have eight people that you can identify to come visit you. Do you see that?

A. Yes.

Q. Do you see that you have your mom on there?

A. Yes.

Q. Your stepfather?

A. Yes.

Q. Your three daughters?

A. Yes.

Q. And the very next name is whose name?

A. Thomas Wright.

Q. Thomas Wright. And this is February 3rd, isn't it, while you are in jail? Isn't that correct?

A. Yes.

Q. And there were two more family members. Is that sisters?

A. They are sisters.

Q. So of the eight people listed to come visit you in jail, all family except Pacman. He is not out of your life, was he?

[683] A. He was out of my life.

Q. He was on your visitation list.

A. He never came up here.

Q. But you put him on your list.

A. I did put that, yeah. I didn't remember doing that, though.

Q. And this visitation list gives these people permission to come visit you.

A. I changed my visitation right after I did that.

Q. In March.

A. I changed it before that. I changed it before that and they said we have—

THE COURT: Ms. Dixon, hold on.

MR. JETT: If we are going to talk about a document not in evidence, I would like to see it.

THE COURT: All right. Go ahead and ask your question.

MR. JETT: That is fine. I understand now.

MS. HEATH: Q. The next visitation list you filled out was the end of March. Isn't that correct?

THE WITNESS: A. I filled one out before that, but they sent it back to me and told me, "You have to change it every 30 days." She said that they don't accept it every 30 days.

Q. And on the next visitation list you put Ted Dixon on it.

[684] A. Because they called there to verify if I would see him because he had came up there with Divinity and I didn't have his name on there. So they told me I had to put it on there.

Q. Ms. Dixon, you have teared up with this jury about talking about the abuse.

A. Yes, ma'am.

Q. And you teared up when you have been talking about the abuse that your children had.

A. Yes, ma'am.

Q. And this is all at the hands of Pacman?

A. Yes, ma'am.

Q. And you are talking about Pacman holding guns to your head?

A. Yes, ma'am.

Q. And on a separate occasion putting a laser dot to your head?

A. Yes, ma'am.

Q. And having shotguns around the house?

A. Yes, ma'am.

Q. And you are in fear of your life from him?

A. Yes, ma'am.

Q. In fear he is going to kill you any day?

A. Yes, ma'am.

Q. Fear he is going to kill your children?

A. Yes, ma'am.

Q. But you put his name on your visitation list. You gave [685] him permission to come visit you, didn't you?

A. I did put it on there and tried to change it, but they said I couldn't change it so I had to leave it as it was for 20 days and then change it.

Q. Nobody held a gun to your head to put his name on the list, did they?

A. No, ma'am; nobody did.

Q. Nobody told you that they would kill you if you didn't put his name on that list, did they?

A. No, ma'am.

Q. Nobody told you that they would kill your children if you didn't put his name on the list?

A. No, ma'am.

Q. You weren't under any duress or stress or coercion or threats to put his name on your list?

A. No, ma'am.

Q. You of your own free will put his name on your list to give him permission to come visit you.

A. I did put his name there.

MS. HEATH: Your Honor, pass the witness.

THE COURT: Let's go ahead and break here for lunch. I have some court hearings at 1:30, so I will be actually tied up until about 2:00. I am going to give you a little longer lunch than usual. So take your lunch break and be back at 2:00. Please recall the instructions that we went over

* * * *

[687] MS. HEATH: Your Honor, the Government's position is that the Defense has not established facts sufficient for this Court to give an instruction to the jury of duress; that the elements—That none of the elements have been met that she is not under an unlawful and present imminent and impending threat of a nature as to induce a well-grounded apprehension of death or serious bodily injury, land that she had not recklessly or [688] negligently placed herself in that situation, that she had no legal reasonable alternative to violate any law, and that a direct casual relationship was reasonably anticipated between the criminal action taken and the avoidance of the harm that she wouldn't be able to avoid the threat and harm.

These are things the Defense needs to prove to the Court to be able to satisfy the Court that a duress instruction is even needed to the jury. That is a separate issue from the issue of whether or not an expert can even come in and testify.

The reason we would have the expert come in and testify pursuant to Rule 702 is that if it will assist the trier of fact to understand the evidence or determine the fact in issue. So in order for an expert to be able to testify, there needs to first be evidence before the jury that that expert will talk about that is relevant to the case or that there is a fact in issue that is relevant to the case. And at this point there has been no showing by the defense that Doctor Myers' testimony can assist the jury to understand the facts anymore than any other layperson can understand the facts that have already been presented to them in light of the fact that a duress instruction may not even be given to them. If there is no duress instruction there is no need to have an expert even come in to explain it. That would be the first hurdle that believe the defense has to overcome is to convince you that [689] they are entitled to a duress instruction, and then to convince you that this jury panel over here needs the assistance of an expert to even understand the facts that they have heard which are not complicated facts.

Even if they are entitled to a duress defense, which I do not believe that they have approached it in any one of the four elements even if they are entitled to a duress instruction, an expert's testimony still needs to be relevant to the evidence and to the issues. And in this case it is clear from case law that the determination of whether or not duress occurs is an objective standard, and there has been no showing by the defense that Doctor Myers' testimony concerning the abuse that Ms. Dixon has suffered and how it affects her judgment over the years is objective. It sounds like it is subjective. And case law has supported the fact that battered women's syndrome is not an objective defense and battered women's syndrome is not sufficient to prove a duress defense.

So on those grounds we do not feel we even get to the point of needing expert testimony in this case from either the defense or the Government.

* * * *

[696] MS. HEATH: Only, Judge, that we get back to looking at what the Fifth Circuit instructions are for duress in this case, and that would be the focus of what the expert would need to assist the jury on is their understanding of how the facts in this case that have been presented can be understood to apply to the duress instruction as it is provided by the Fifth Circuit.

There is a conflict with the fact that the Fifth Circuit requires that it be an objective evaluation of the facts as they are presented, to even get to the point of being presented to the jury. Doctor Myers' anticipated testimony will be subjective, how she is more susceptible to being threatened or not being able to get out of the situation because of her past battering. And that is totally subjective.

The Sentencing Guidelines provides for just what the defense is trying to present—for facts subjective that can be considered by the Court in mitigating a defendant's sentence

on a defense of duress that doesn't meet the legal requirements of duress. And there is a specific section in the guidelines that [697] provide for that. There is case law that specifically say that the sentencing guidelines can include subjective evidence as far as this person's susceptibility to being placed in a situation where they felt that they were without a choice. But that does not meet the legal requirements that the Fifth Circuit has set out.

The Fifth Circuit specifically in United States versus Posada-Rios, 158 F3d, 832, a 1998 case, said that a threat is present, imminent, and impending only if there is a real emergency leaving no time to pursue legal alternative. The same case also explains that the Defendant has a burden to prove that she had actually tried the alternative or had no time to try it. And there has been no evidence of that in fact, just the opposite.

The Defendant has indicated that she did not believe the Defendant would shoot her at the gun show, so it is not imminent. She has indicated that she was negligent for placing herself and her children in this situation. She has indicated that yes, there were options available, but she just didn't think about them or didn't do them, for whatever reasons, which would be subjective as to why she particularly did not follow through with the available options of calling the police, of alerting security, of contacting friends, of contacting family, all of which she could have done. And she has admitted she should have done that.

[698] And finally, there is ways she could have avoided the harm—just not to go buy the guns; to fill out the forms correctly, she would not have gotten the guns; to avoid the situation altogether. So every one of the elements the Defendant has specifically negated, as opposed to presenting to this Court to prove, which is their responsibility to prove.

So since they are not even entitled to the duress instruction to go to the jury, there is no need to have an expert witness

explain facts that are already in evidence, facts that the lay people can evaluate just as clearly as an expert can. And if the expert is going to come in and give a subjective explanation, that defeats the purpose that it needs to be an objective proof presented to the jury, and would be more apt to confuse the jury as to what actually they need to consider when they consider the elements of a duress defense.

So we think it would be more confusing than not to present the expert, even if a duress instruction was available to the defense at this time.

THE COURT: Is it your position that because it is an objective standard that there is no expert testimony that would ever be relevant or valid?

MS. HEATH: No. I would think that if there is some fact or explanation—I mean, some evidence that has been presented to the jury that satisfies the Court that there is a duress instruction to be given to the jury, that an expert may [699] be able to come in to explain a particular element that is contested, such as one of the four elements, or two of the four elements if there is an objective standard.

Flight or fight, the example I gave in my motion in limine where a prisoner escapes the institution because it is on fire; not that that would be something that a jury could not understand themselves, but perhaps an expert could come in and say, "A reasonable person has instilled in them this flight if they are in danger, and they will flee regardless of what the circumstances may be. So if they have to commit a crime and escape from prison to avoid a fire, then perhaps that was the right thing for this person to do, because every person would do this. This is a reasonable standard. The reasonable man would do this."

We are not talking about a reasonable person here. We are talking about Doctor Myers coming in to say why specifically Keshia Dixon, because of her particular background, is sus-

ceptible to being intimidated by significant men in her life, specifically Pacman in this instance.

So I think that there would be occasions when experts could come in and testify, but in this case we don't even get to make that determination because the Defense has not presented to you objective evidence that is admitted before the jury that satisfies the four prongs of the elements of a duress defense. So we don't even get to the point where we need an [700] expert to explain it to the jury. That would be the Government's position.

THE COURT: Okay. All right. Briefly?

MR. JETT: Judge, I think we have certainly put on enough evidence to get to the duress defense. I mean, I think I she has been real clear as to what the immediate harm was that she was afraid of, and it was very, very close in time. It was immediate because he said, "If you don't do this, I just have to make a phone call, and there is somebody back there with your kids." I don't think it requires him to put a gun to her head right then.

THE COURT: I am not having actually a problem with that one. I think on that one you have probably established it. The way I look at it is if you believe Ms. Dixon's testimony on that, then I think there is evidence that an objective person would feel an imminent threat there. I don't think she had to believe he would kill her there under the circumstances.

But as you get down on the others, the reasonable legal alternative to violating the law, those are some of the ones that I think are a little more problematic.

Let's go ahead and finish up Questioning Ms. Dixon, and I will give that some thought after hearing your arguments, and we will take it up after finishing with Ms. Dixon.

* * * *

[701] THE COURT: Go ahead.

MR. JETT: In terms of—It looks like you are talking about three, the reasonable legal alternative. Well, if you are—It is actually similar to the first element in that if you are there—

THE COURT: Part of the problem I am having is a lot of the argument you are making sure sounds like it is subjective, and you may not want to call it battered women's syndrome, but it sure sounds a lot like it. That is the problem that I am having.

MR. JETT: It does sound a lot like it, but let me make the distinction for you, if I can. Battered woman's syndrome, that term is really not a—It is not a current term that is really accepted.

THE COURT: That is why I don't want to get caught up in semantics. When you say this is not really a syndrome, that doesn't tell me anything. The point is, I think as the Fifth Circuit was pointing out in its cases is that all that tends to show is subjective pattern of thought and behavior by this particular individual because of circumstances that that person found themselves in, and they said that is not relevant. That isn't relevant to this legal standard. And if that is where you are going, then I think Ms. Heath is correct.

MR. JETT: That is not—

THE COURT: That is where Doctor Myers is going to [702] go, is that, "Well, based on this past history, she was in this relationship with Mr. Dixon, this relationship with Mr."—What's his last name? Wright?

MR. JETT: Dixon

THE COURT: "And this is her situation and this is why she did what she did." That sounds very subjective. That is the problem the Fifth Circuit had with it; not that it was called a syndrome or whatever it was called, but I think just the explanation that was being given, it was a subjective explanation, subjective reasons for why this person was doing that.

And they are saying we have to look at objective, somebody has to be able to look at it and give some objective reasoning.

MR. JETT: It is hard to draw the line between where subjective stops and objective begins, or vice versa.

THE COURT: You show the subjectiveness I think and what happened in her past to show the circumstances, because that is the circumstances you have to take, and then you put an objective reasonable person in those circumstances, the circumstances that the Defendant was found in, and then you make a determination as to what an objective or a reasonable person would have done.

MR. JETT: I think that is what Doctor Myers will do. But she will talk about what the research shows and what her experience shows that reasonable people do when subjected [703] to this kind of conduct. Very plainly, that is what it is. And what apparently the researchers have learned about is that when reasonable people are subject to this kind of conduct with an intimate partner, that they see patterns of behavior of the batterers and the batterees. And they are not saying that these people are unreasonable people. What they are talking about is that they are reasonable people who have been subjected to an unreasonable situation.

It is much like somebody who has been a prisoner of war or something and how they react to that circumstance. And I think there has been some research on how they react and deal with, and sometimes actually bond with their captors. So those are reasonable people put in unreasonable circumstances, and science and research has shown that there are patterns of behavior and perception and judgment there.

Well, it is similar, it is not the same here, but it is similar to somebody who is a battered woman. Again, it is not—A syndrome implies a diminished capacity. And what we are going to talk about is not a diminished capacity, but how certain factors operate on a reasonable person.

* * * *

[705] stay in that situation. And that is what the Fifth Circuit is saying—that that is totally subjective and should not be considered for a duress defense.

THE COURT: Let's press forward, and I will give you a ruling sometime before I let him call Doctor Myers. Are you ready for the jury? Are you ready to proceed? You are up, Mr. Jett. Are you ready?

MR. JETT: Yes, Your Honor.

THE COURT: Go ahead and bring the jury in. (Whereupon, the jury entered the courtroom)

THE COURT: Mr. Jett?

MR. JETT: Thank you, Your Honor.

REDIRECT EXAMINATION

By Mr. Jett:

Q. Good afternoon, ladies and gentlemen. Keshia, you look different this afternoon. Would you tell the ladies and gentlemen of the jury why?

A. My mother brought me some clean clothes.

Q. And were you able to put them on this morning?

A. No.

Q. There was testimony earlier that in August you put Mr. Wright—Well, let me ask this. Back in August did you and Mr. Wright get along well?

A. Yes.

Q. And were you having a good relationship?

[706] A. Yes.

Q. And there was testimony that you put him as a name on somebody to contact in an emergency for one of your daughters. Is that correct?

A. Yes.

Q. Now, did that occur before or after—First, when did that occur?

A. It was in August.

Q. So was that before or was it after the abuse started?

A. Before.

Q. Now, these—You said that in December of 2002 your daughter transferred schools. Is that correct?

A. Yes.

Q. As far as you recall, did you fill out new papers or did the old papers simply get transferred?

A. The old papers came when I transferred her from the old school.

Q. So after December you didn't put him down as somebody to call for an emergency?

A. No.

MR. JETT: Judge, before I continue can we get Doctor Myers back in?

THE COURT: Sure. Yes, sir.

MR. JETT: Q. Now, there was some discussion about when Pacman stayed with you and when he didn't stay with you. [707] When did he start actually living with you full time?

THE WITNESS: A. In December.

Q. Is that December of 2002?

A. Yes.

Q. And before that what was the nature of the—How much was he in and out?

A. He was in and out a lot there before that.

Q. There would he sometimes that he would spend the night?

A. Yes.

Q. And other times when he would not?

A. Yes.

Q. was it more frequent sometimes than other times?

A. Yes.

Q. And I am talking about from between August to December?

A. Yes.

Q. When was it most frequent?

A. In November.

Q. Now, and was it—How frequent was it say in August and September?

A. He was there a lot. He was just in and out.

Q. Now, when you pled guilty to the other charge on November the 8th, were you being threatened by anybody?

A. No.

Q. Was—Had he pulled a gun on you?

A. No.

[708] Q. You all had had some fights?

A. Arguments; yes.

Q. But at that point in time did you feel threatened or not?

A. No.

Q. So anything at that point in time you felt you needed to tell the Court about?

A. No.

Q. And there was some conversation about Ted Dixon, your prior husband. Would your girls have gone to live with him? Would the older girls have gone to live with him?

A. No.

Q. Okay. Why is that?

A. They wouldn't want to go live with Ted.

Q. Why?

A. Because he had whipped them. He had beat them.

Q. Had he ever whipped Divinity?

A. Later on, but not during that time; no.

Q. And did he ever whip Divinity to the extent that he whipped the other girls?

A. No.

Q. And which one is his daughter?

A. Divinity.

Q. And she is how old?

A. She is 11.

Q. There was also some testimony about your friend Hollywood [709] having a gun. Doe you remember that?

A. Yes.

Q. Why did Hollywood go get a gun?

MS. HEATH: Your Honor, objection as to why Hollywood got a gun. That is speculation on her part. If she knows because he told her, it is hearsay.

THE COURT: She may know. I wonder why it is relevant.

MR. JETT: They brought up why Hollywood had a gun, and I want to explain why. And it does pertain to an issue in the case.

THE COURT: Go ahead.

MR. JETT: Q. Can you tell us?

THE WITNESS: A. Because me and Ted had got into it, and Ted told me he was going to jump on me and kill me because I told him he couldn't see Divinity.

Q. And Hollywood did what in response?

A. Because he was on the other phone listening to what Ted said, so he went and got a gun.

Q. Did Ted ever come over?

A. No; he just kept calling.

Q. These checks that you were passing, was Ted involved in that?

A. Yes.

Q. Did he pass some checks?

[710] A. He cashed.

Q. Cashed some checks?

A. Yes.

Q. Did he at some point provide evidence against you for the government?

MS. HEATH: Your Honor, we object as to the relevance of that. Ms. Dixon already testified she was cooperating with the Government as well at that time.

THE COURT: I think it goes to the relationship between the two; and, of course, both of you have explored that. Go ahead. Overrule the objection,

MR. JETT: Q. Did Ted provide evidence to the Government to help prosecute you?

THE WITNESS: A. Yes.

Q. Since you all have gotten divorced has Ted done anything to really help you?

A. No. No.

Q. Has he been coming to see you in jail?

A. He has been bringing my daughter.

Q. Why did you put Ted on the visitation list?

A. Because they called back there and told me that—They asked me did I know a Ted Dixon. I told them yes. They asked me who he was. I told him he was my ex-husband.

MS. HEATH: I object to the relevance and hearsay.

MR. JETT: Q. I understand. Don't say what they [711] said. I just want you to say why you put him on the visitation list.

THE WITNESS: A. Because he had my daughter up there with him.

Q. How were you able to see Divinity?

A. When Ted brought her.

Q. Have you been able to see her otherwise?

A. A couple of times my mother was able to come up there and bring them.

Q. Does Ted—How often does Ted bring her?

A. On Sundays sometimes.

Q. When he comes does he ask you questions about your case?

A. Yes.

Q. what kind of things does he ask you?

MS. HEATH: Your Honor, we object to the relevance.

THE COURT: That is hearsay. I sustain.

MR. JETT: Q. Now, there was also some questions of you about why you didn't call the police. Can you tell the jury why you didn't call the police?

THE WITNESS: A. Because I was afraid for my life.

Q. Now, can you tell me whether or not the police could have been at your house all the time?

A. No.

MS. HEATH: Your Honor, we object to this as far as relevance as to whether the police could be there all the time [712] or whether or not she would even know about security, if they have a security guard on the premises that is there 24 hours.

THE COURT: Then you may ask her on cross, Ms. Heath. Both of you have gone into it. Overrule the objection. Let's move on.

MR. JETT: Q. Can you tell us whether or not you thought the police would be able to help you?

THE WITNESS: A. No.

Q. How about all of these—They mentioned friends at church. Why couldn't you tell them?

A. I was afraid for me and my children, and then I didn't know anybody there but my mother and them.

Q. What were you afraid of that would happen if you told somebody?

A. Hookie was with me. I didn't know if he had anything on him. I didn't know nothing. I just knew that he had to come with me.

Q. What did you—There was talk about why didn't you tell the security guard or the gun dealers at the gun shows. What were you afraid of there?

A. I was afraid for my kids. My kids was at the house and there was somebody else with them.

Q. Now, you didn't know any of the security guards at the gun shows, did you?

A. No, I didn't.

[713] Q. Did you know any of the gun dealers?

A. No.

Q. Who was with you the entire time?

A. Pacman, Hookie and them.

Q. Were you afraid of anything if you went up and talked to these people about something other than guns?

A. Yes.

Q. What were you afraid of?

A. That something would happen.

Q. And what is that something?

A. They would either kill me or my kids.

Q. By doing what Pacman asked you to do, what did you hope to achieve?

A. That he would leave me alone; that I wouldn't get beat up, and I don't have to worry about another pistol being put in my face and him threatening to do something to us.

Q. So would it be accurate to say that was your solution to the threats?

A. Yes.

Q. Now, at the time under the circumstances did that seem like a reasonable solution to you?

A. Yes, it did.

Q. Now, there was also some discussion about why you didn't tell all these guys like E and Hookie and Tyshon and T.K. and A.D. and all those guys. Why didn't you tell them?

[714] A. They was Pacman's friends. They knew what was going on.

Q. And Farrah, who is Farrah? That is his sister.

Q. Could you tell her?

A. No.

Q. Why not?

A. She was aware of the stuff that was going on.

Q. Now, there was some testimony earlier that you had actually seen a shotgun.

A. Yes.

Q. When was that?

A. It was in December.

Q. And where did you see it?

A. It was in my closet.

Q. Was it just right out in the open?

A. No,

Q. Or was it concealed in any way?

A. I was on the shelf looking for something, and I saw a blanket and unfolded it and it was sitting there.

Q. Did you know it was there?

A. No, I didn't.

Q. After you found it what did you do?

A. I asked Tyshon about it, and he told me I needed to talk to Pacman, so I paged Pacman and he came.

Q. Then what did you do?

[715] A. I told him he needed to get that out of the house because I didn't want no guns in the house.

Q. Did he get it out of the house?

A. He took it out. He gave it to Tyshon and he took it out.

Q. At that point in time apparently Pacman was willing to get rid of the guns. Is that right?

MS. HEATH: Objection, Your Honor, as to leading the witness.

THE COURT; Sustained.

MR. JETT: Q. Did that change his willingness to keep the guns away? Did that change?

MS. HEATH: Objection, Your Honor. There has been no evidence that he did it willingly. That is facts outside the evidence that has been presented to the jury at this point.

THE COURT: Overruled. You may ask. Go ahead.

MR. JETT: Q. Do you understand the question?

THE WITNESS: A. Can you repeat it?

Q. Sure, We know that apparently Pacman took the shotgun out or caused it to be taken out. Is that right?

A. Yes.

Q. So he did what you asked him to do.

A. Yes.

Q. Is that right? Did it get to a point where he wouldn't have done or didn't do what you asked him to do?

A. Yes.

[716] Q. And when was that?

A. Later on.

Q. Later on did you ask him to get rid of the guns?

A. Yes.

Q. What did he say?

A. He told me he wasn't going to do nothing; that is his place he would do what he wanted to do.

Q. Now, you are also telling us that early on when you got hit it was in certain parts of your body. Do you recall that?

A. Yes.

Q. And those parts were?

A. My shoulder, back, and chest.

Q. Around the time of the gun show, did the nature of that violence to you change?

A. Yes.

Q. And how did it change?

A. He hit me in my face and choked me, along with the rest of it.

Q. Had he done those things before?

A. He had never hit me in my face.

Q. The apartment on Forest Springs, how many months did you pay the rent?

A. December.

Q. Did you pay it in January?

A. No. I wasn't working.

[717] Q. Did it get paid?

A. No.

Q. Why didn't you pay it in January?

A. Pacman was supposed to pay it but he didn't pay it.

Q. Did you have the money to pay it?

A. No.

Q. There was also some testimony about why during the Christmas holidays you didn't tell somebody about what was going on. And so over at Christmas time had you been threatened with a gun—Let me ask it this way. Had he pointed a gun at you? Had Pacman pointed a gun at you?

A. No.

Q. Had he hit you in your face?

A. No.

Q. At that point in time at Christmas time did you think your kids were in danger?

A. No.

Q. When did you think that they were in danger?

A. When Pacman threatened to kill us, and when I heard them talking about the so-called murders that they supposedly done got away with.

Q. Now, you were telling the jury about when asked about why you didn't do certain things, you said, "I wasn't thinking like that." And what did you mean when you said you weren't thinking like that?

[718] A. What I meant was that I was trying to protect me and my kids. I didn't want any harm or anything coming to us. I didn't want us to end up getting killed, so I did what he said.

Q. And so your strategy to keep you all safe was to do what?

A. Is to do what I was told to do.

Q. At the time did that make sense to you to do?

A. To do what I was told to do?

Q. Yes.

A. Yes, it did.

THE COURT: Mr. Jett, you used 15 minutes. You need to wrap it up.

MR. JETT: Yes, sir.

MR. JETT: Q. Did you want to buy the guns?

THE WITNESS: A. No.

Q. Did you have any use for the guns?

A. No.

THE COURT: Mr. Jett, that has already been covered plenty. If you don't have anything new to ask—

MR. JETT: I have two more questions, Judge.

THE COURT: Okay. Finish it up.

MR. JETT: Q. How do you feel about—Let me ask this. Would you have bought the guns without the threat?

THE WITNESS: A. No, I wouldn't.

Q. How do you feel now about having bought them?

A. I feel bad about it.

[719] MR. JETT: Pass the witness.

THE COURT: Ms. Heath?

RECROSS EXAMINATION

By Ms. Heath:

Q. Ms. Ashford, or Ma. Dixon, you indicated that since your divorce Ted Dixon hasn't done anything to help. Is that correct?

A. No, he hasn't done anything for me.

Q. Okay. So providing child support for you doesn't help?

A. It is something that I took him to court on.

Q. So his providing child support money to you does not help you.

A. It helps a little bit. That is it.

Q. And how about his continuing to maintain a relationship with his daughter Divinity. That doesn't help you?

A. That is not something that he is doing for me.

Q. Okay. So that does not help you to know your daughter is maintaining a relationship with her father?

A. Re has never had a problem maintaining a relationship with Divinity.

Q. That is not the question. It does not help you in any way for your daughter to maintain a relationship with her father?

A. In spite of how I feel about Ted, no, it doesn't.

Q. And it doesn't help you at all that he is available to pick them up from school or drop them off when you are not [720] available. That doesn't help you.

A. Yeah, he did that.

Q. And it doesn't help you at all that he brings Divinity up to the jail to visit with you. That doesn't help you at all.

A. That is not the only reason why he does it.

Q. No, that is not the question. It doesn't help you at all for Ted Dixon to bring your daughter up to visit you?

A. I appreciate him bringing her.

Q. And it doesn't help you to know that Ted Dixon was available to take the three girls in the event that your mom didn't take them, to keep the girls in the schools that they were in when you went to prison. That doesn't help you at all.

A. I didn't need Ted to take my girls. My mom was going to do it. It is something he offered.

Q. That is a back-up plan that didn't help you at all to know that Ted Dixon was available to take your girls in the

event you went to prison and they wanted to stay in the same schools?

A. No, because I was not going to do it.

Q. You mentioned one of the reasons why you didn't contact the security at the gun show or call the police—you didn't know them; you didn't have a personal relationship and you didn't know them.

A. No, I didn't.

Q. So you don't want to call in strangers to help you. Is that what you are telling the jury?

[721] A. No, that is not what I am saying.

Q. So you put more faith in Pacman and Hookie and T.K. and A.D. and E and Little Half than law enforcement, than the police.

A. No. I put my faith in trying to keep me and my kids alive.

Q. In trying to keep you and your kids alive, you did not think it was reasonable then to call the police?

A. I didn't know if something would happen to me if I tried or what.

Q. You didn't think it was reasonable to tell your mom about it?

A. I didn't want to get my family in danger.

Q. You didn't want to think it was reasonable to tell your dad or stepdad about it?

A. I didn't want to put my family in danger.

Q. Not only are you protecting yourself and your kids, you are protecting your mom and stepdad?

A. I had enough to worry about with me and my three.

Q. Pacman never threatened your mom.

A. But he knew where I lived.

Q. Pacman never threatened your mom, did he?

A. No.

Q. Never threatened your father?

A. No.

[722] Q. Never threatened your stepfather?

A. No.

Q. Any of your sisters or brothers?

A. No.

Q. You indicated that you believed it was a solution to the threats, the threats of getting beat up, a pistol in your face, threats to you to your children, you believe it was a solution to buy the guns. Is that correct?

A. Yes.

Q. After the first gun show, did all of the heating stop?

A. No. We were still into it.

Q. So that wasn't a solution, was it?

A. At the time I thought it was.

Q. So when you go to the second gun show, you know buying those guns aren't going to stop any of that. You know that.

A. Yes.

MS. HEATH: Pass the witness.

THE COURT: Ms. Dixon, you may step down.

MR. JETT: Judge, I have another question.

THE COURT: No, sir. You may step down. Call your next witness. We explored it plenty. Call your next witness.

MR. JETT: Call Kelly Oates.

THE COURT: Agent Oates.

(Whereupon, the oath was administered by the Court)

* * * *

[741] THE COURT: And so Defense Exhibit No. 6 is admitted for record purposes only.

MR. JETT: And that is all I would need Agent Oates for, Your Honor.

THE COURT: Agent, thank you. Do you want to make your bill with respect to Doctor Myers?

MR. JETT: I know you want it to be short.

THE COURT: I am not going to let you put on her whole testimony. I want to hear a brief synopsis from her as to the opinions and conclusions, and the basis for that, and I think we can do that in 10 or 15 minutes. If you can't do it in 10 or 15 minutes, I will do the questioning.

MR. JETT: I am sorry. Are you going to allow me to put her on briefly then?

THE COURT: Yes; briefly. But I am not going to let you play out the entire direct examination. I want about 10 or 15 minutes worth of conclusions, opinions, the basis for that, and I think that can be done fairly quickly.

MR. JETT: I am sorry. I thought you were wanting me to state it.

THE COURT: I don't mind you getting it from her.

MR. JETT: We call Doctor Myers.

THE COURT: If you would please, ma'am. Lets me go ahead and administer the oath, Doctor Myers.

(Whereupon, the oath was administered by the Court)

[742] TOBY MYERS,

TESTIFIED ON DIRECT EXAMINATION BY MR. JETT AS FOLLOWS:

Q. Would you state your name, please?

A. Yes. My name is Toby Myers.

Q. Without going through all of your qualifications, I am going to show you what has been marked Defendant's Exhibit No. 1, and ask is this a summary of your educational background and your qualifications in your area of expertise?

A. Yes, sir, it is.

Q. And if you were to—Would this constitute a summary of what your testimony would be as to your qualifications?

A. Oh, yes; as to my qualifications. Yes, sir.

Q. Okay.

MR. JETT: Judge, we will offer Defendant's Exhibit No. 1.

THE COURT: All right. Any objections for the record?

MS. HEATH: No objections for record purposes.

THE COURT: Admitted for record purposes.

MR. JETT: And so I have provided a copy to Eric here, Your Honor, if the Court wants to review it.

MR. JETT: Q. Doctor Myers, would you—Let me ask this. You were hired by or asked by me to do an investigation and evaluation of Keshia Dixon. Is that correct?

THE WITNESS: A. Yes, sir.

[743] Q. Okay. Would you tell the Court what it is that you did to prepare to give your opinion:

A. Yes. I met with Keshia Dixon, I took a long and detailed social history—

Q. How long did that take?

A. I met with her on two days in June and one day in July. I have had telephone conversations with her. I met with her mother and two older daughters.

Q. And can you tell me how much time you have spent talking to Ms. Dixon?

A. Probably about 12 hours to 14 hours.

Q. And how long did you talk to each of the daughters?

A. I met with the grandmother and the two daughters for about an hour and a half in Greenville, and I have spoken with them on the phone probably another 30 minutes.

Q. And did you review any other documents?

A. Yes, I reviewed many documents.

Q. Can you tell us the documents that you reviewed?

A. I can hand you a list of them. Would that be easier?

Q. That would be easier. It will go faster.

A. It will go a lot faster.

MR. JETT: Can I just read the list, Judge, to make this move faster.

THE COURT: Yes, sir. Go ahead.

MR. JETT: Okay, Did you—I am going to read a [744] list and then ask you after I finish if you reviewed all these matters. You reviewed the judgment Ms. Dixon's prior criminal case?

THE WITNESS: A. Yes, sir.

THE COURT: Just read them off, counsel. Just read them off.

MR. JETT: Q. And the presentence report in the prior case, the indictment in this case, the criminal complaint by Agent Oates in this case, the application and affidavit of Todd Nunely in this case, the transcript of the hearing on the motion to revoke pretrial release, a book called *Compelled to Crime* by Beth Richie, the National Institute of Justice Publication on battering. Let me get the title.

THE WITNESS: A. I have it right here.

Q. And it is called *The Validity and Use of Evidence Concerning Battery and Its Affects in Criminal Trials*, which is a Department of Justice publication. An article by Barbara Hart called *Lethality Assessment*, divorce and child support documents, an order affecting the parent/child relationship, and a protective order relating to Keshia Dixon and Ted Dixon, Ted Dixon's his criminal record, criminal records regarding Thomas Earl Wright, his felony drug conviction, an allegation of family violence by his sister, criminal records regarding Cory Rayon Harris, in particular a felony aggravated assault conviction. Is that a good summary of what you reviewed?

[745] A. Yes.

Q. And also to add to your vitae, have you treated and worked with battered women?

A. Yes, I have.

Q. How many, about?

A. A thousand or maybe more.

Q. Have you also treated and worked with batterers?

A. Yes, sir.

Q. How many?

A. About the same amount.

Q. Has the subject matter of domestic violence become a subject of research and study?

A. Yes, sir, it has.

Q. Is there a body of scientific research that relates to it?

A. Yes, sir, there is.

Q. Is it accepted in the scientific community?

A. Yes, sir.

Q. Is the research also accepted by the United States government?

A. Yes, sir.

Q. Have you testified as a witness and qualified as an expert witness in civil and federal—Excuse me. Criminal and civil cases?

A. I have.

Q. About how many, please?

[746] A. Upwards of 40, but around 40; a little more.

Q. Has this all been in the subject of domestic violence?

A. Yes.

Q. Could you briefly tell the Court what is domestic violence?

A. Domestic violence is a pattern of coercive control by one party, generally the male, over another party, generally the female, where there are tactics of power and control used and violence and sexual abuse.

Q. I am going to show you what has been marked as Defendant's Exhibit No. 2, and just ask you, is this a summary of the elements of what would be a power and control relationship?

A. Yes, they are.

MR. JETT: We will offer Defendant's Exhibit No. 2.

THE COURT: Ms. Heath, any objection admitting that for the record?

MS. HEATH: No objection for the record, Your Honor.

THE COURT: Admitted.

MR. JETT: Q. Exhibit No. 2 reflects about eight factors that often make up a power and control relationship. Do you have your copy there?

THE WITNESS: A. I will get it right away. Yes.

Q. Do you have yours to refer to, or do you want to use this?

A. Either one you want.

Q. Why don't you just use yours. Can you—Is it necessary to have all of these characteristics to have a relationship [747] that is based on power and control?

A. Well, if there aren't children involved, usually just about all of them are involved.

Q. Okay. And when somebody is a victim of domestic violence, is a common term that we used for them battered woman?

A. Yes.

Q. Is it most often a female who is the battered person?

A. Most often.

Q. Okay. Could you summarize for the Court how the battering affects the victim?

A. Yes. Once someone is subjected to this, typically a battering relationship starts off very nice and loving and ardent, and the woman thinks all this attention, "Gee, this is great."

Q. I really wasn't asking how it worked. I just wanted to talk about the affects.

MR. JETT: Let me see if I can lead her a little bit, Judge, and do that.

MR. JETT: Does the battering cause physical harm?

THE WITNESS: A. Yes.

Q. Does the battering damage self-esteem and the self-worth of the victim?

A. Yes. It causes physical, emotional, and psychological harm.

Q. Does it cause a person to become isolated, withdrawn, or [748] dependent? Just answer yes or no.

A. Yes.

Q. Okay. We are trying to make a bill, and so we are—

A. Okay.

THE COURT: We are just hitting highlights here is what we are trying to do, Doctor Myers.

MR. JETT: Q. Does the victim become subservient to the batterer?

THE WITNESS: A. Yes.

Q. Does the victim learn to change her behavior so as not to anger the abuser?

A. She does.

Q. Can the battering cause a person to engage in conduct that the victim would not otherwise engage in but for the battering?

A. It can.

Q. Can that cause criminal behavior?

A. It can.

Q. Would the battering affect the perceptions of the victim?

A. Yes.

Q. Would the battering affect the judgment of the victim?

A. Yes.

Q. Okay. Would the battering affect the behavior of the victim?

A. Yes.

Q. Okay. Can you—Is somebody who has been battered, do [749] they necessarily have a mental disease or defect?

A. No, they don't.

Q. Do they have a—

A. They could have, but ordinarily they don't.

Q. Do they have a mental condition or illness?

A. No

Q. Is there something called a cycle of violence?

A. Yes.

Q. Can you briefly explain what that is?

A. Yes. It is called—There is the violent episode which is called the explosion, and after that initially there is usually a stage called the honeymoon or the tranquil stage, and then after that there is the tension-building stage where things start building up again until another explosion.

Q. Okay. Does this occur once in an abusive relationship or does it occur over and over?

A. It occurs over and over until the honeymoon stage or the tranquil stage gets lesser and lesser, until sometimes there is not even a very pleasant time afterwards.

Q. Okay. Why does a woman stay in a battering relationship?

A. Well, the most dangerous time in a woman's life is when she is leaving a relationship is one reason. Another reason is financial. Another reason is fear and terror. Another reason is she doesn't have a well-laid plan of how she is going to succeed without this. Another, and many times an overriding [750] reason, is what she wants is the abuse and violence to stop, not the relationship. And she is trying to figure out how to make it work.

Q. Is it common for the victim of a battering relationship to not seek help from the police, authorities, or other people?

A. Yes, it is.

Q. Okay. Why?

A. Because of shame is one of the reasons.

Q. What are the other reasons, briefly?

A. Because it might escalate the violence.

Q. And does economics play a part?

A. Economics plays a part; danger plays a part.

Q. Do women often have a strategy for evading the battering?

A. Almost all women try to figure out what to do to make this better.

Q. Okay. And what is the—What is a common—Is there a common strategy to avoid the battering by compliance with what the batterer wants?

A. I think initially sometimes women register a lot of protest and fight back, but sometimes they realize that their fighting back isn't going to be very helpful and just makes it worse, so she learns to quiet down.

Q. Are there misconceptions about whether a victim of domestic violence is really trying to help the situation or not?

A. Yes.

[751] Q. And why is that?

A. Because it looks like she is acting not in her own best interest sometimes.

Q. Are the things they do effective?

A. Sometimes yes, sometimes no. Usually not.

Q. Okay. Let's talk about Keshia Dixon.

A. All right.

Q. You told us how you know her.

A. Yes.

Q. And how much time you have spent with her.

A. Yes.

Q. The method that you used to evaluate her, was that an accepted method in your field?

A. Yes, it is.

Q. Did she have any kind of scientific or educated knowledge about domestic violence and its effects?

A. Not that I know of.

Q. Did she appear to display any?

A. No.

Q. Okay. Is she a battered woman?

A. Yes, she is.

Q. Has she been the victim of domestic violence?

A. Yes, she has.

Q. What is your conclusion based on?

A. My conclusion is based on my experience, studies, [752] generally accepted definitions in the field and in the literature.

Q. Was she battered both by Ted Dixon and Thomas Earl Wright?

A. She was.

Q. The relationship with Ted Dixon, did that become a power and control relationship?

A. Yes, it was.

Q. The factors that are on Defendant's Exhibit No. 2, the power and control wheel, did they all exist in that relationship?

A. Yes.

Q. Did she or can you tell us why she stayed in that relationship?

A. Well, Ted Dixon was stable, her family thought he was nice, he took care of her, he was willing to take in her daughters, he helped her get an education where she could earn a living, but then he began to do other things like sabotage her. But he looked like a dream come true initially.

Q. Okay. Did he engage in all the conduct related in the power and control wheel?

A. He did.

Q. Okay. Did his relationship—Did the power and control relationship over her continue after the divorce?

A. Yes.

Q. Okay. Did the effects of the battering continue, Ted's [753] battering, continue on Keshia?

A. Yes, it did.

Q. Okay. Did the experience of being a victim of battering by Ted Dixon contribute to the relationship with Thomas Earl Wright?

A. Yes.

Q. And how did it do that?

A. I think she figured she survived Ted so she could take on Wright, that she thought she was tougher than she was, and that relationship escalated.

Q. Okay. Did she—Did Ms. Dixon have a power and control relationship with Thomas Earl Wright?

A. Yes, she did.

Q. Was he the one in power and control?

A. Yes, he was.

Q. Did they have all the eight factors of the power and control wheel in that relationship?

A. Yes.

Q. Did the relationship start out with those characteristics?

A. The relationship started out nicely.

Q. Did it start in a typical way that battering relationships start?

A. It did.

Q. Okay. As time went on did the relationship get better or worse?

[754] A. It got worse.

Q. Did the relationship, was it different somewhat than other relationships in regard to the amount of time that it took to reach the power and control relationship situation?

A. It was a relatively short relationship, but yes, it—Do you want to do your question again? I think I lost it.

Q. Sure. The amount of time it took the relationship to evolve to one relating to power and control, was that a short time or a long time?

A. Short.

Q. By early January of 2003, would you say that power and control relationship was in full swing, so-to-speak?

A. Yes.

Q. Okay. What were the—Can you tell me the factors that made it that kind of relationship?

A. By January?

Q. Yes.

A. Well, she was more vulnerable because she had lost her job so her resources were diminished. He had introduced hitting her into the face, he had introduced guns into this relationship.

Q. Okay. Did he discover another way in which to cause her to do things?

A. Yes. He threatened her and the children.

Q. Did the violence escalate over a period of time?

[755] A. Yes.

Q. And it got worse just before the gun shows. Is that right?

A. Yes.

Q. How did all of these circumstances affect her ability to make a decision about whether to buy those guns or not?

A. I think in her heart and her mind she didn't have a choice.

Q. Was she afraid of him?

A. Very much so.

Q. Were her fears well-grounded?

A. Yes, sir.

Q. What was the purpose in buying the guns?

A. To buy some time.

Q. And what was she buying time to do?

A. Trying to figure out what to do, hoping something would happen. One of the things was going to jail.

Q. Okay. Would she have—Without the threats of Thomas Earl Wright, would she have bought the guns?

A. No, she wouldn't have.

Q. Is it consistent with a power and control relationship for Pacman to force her to do something illegal?

A. Could be.

Q. Okay. Would it be consistent with a power and control relationship to put the batterer, the victim, excuse me, at risk by doing something illegal?

[756] A. It could be.

Q. Okay. Was it in this situation?

A. Definitely.

Q. In this situation did it appear that Mr. Wright had a concern for her well-being or not?

A. I think he had a flagrant disregard for her well-being.

Q. Can you tell me, was she intimidated into doing something illegal by a threat of death or serious bodily injury?

A. Yes.

Q. Was there any—Who was the responsibility put on?—Who did he put the responsibility on for buying these weapons?

A. He put it on her.

Q. How did he use the threat to her children?

A. He said that for her to remember that they were not home alone, and that he could make a phone call in a minute.

Q. Would—At the time she bought the guns on January the 3rd, would she have—Did she believe she had an option but to do something else?

A. She didn't.

Q. Did she—What did she think that she was achieving by buying the guns?

A. She was buying a little more time.

Q. From your observation of this relationship, was she somehow reckless or negligent to put herself in a situation where she would be forced to choose criminal conduct?

[757] A. No. I think it goes to how terrified she was that I don't think she would have bought the guns or would have agreed to buy them even if she wasn't going to get in trouble, and I think she knew there was tremendous potential.

Q. From her perspective based on her experience, did she believe she had a legal alternative to violating the law?

A. I didn't see that she thought she had one.

Q. Why did she not call the police and seek help?

A. I don't think she thought it would do any good.

Q. Why didn't she talk to her family or somebody else?

A. I think she was embarrassed and didn't want to involve them, and felt like she made a hard bed and she had to lie in it.

Q. You said she wanted to hang on and buy time. What was she buying time to do?

A. She was buying time just to stay alive one more day.

Q. And a particular goal she had in mind, if something might happen down the road that would get her out of this?

A. Well, I think one thought, she thought that if she was arrested that would get her out of it. Also she was thinking about what could she do to do this.

Q. Would it be a—If somebody is a battered woman and subject to domestic violence, would her behavior that you have seen in this case and you—You have heard her testimony, have you not?

[758] A. Yes, I have.

MR. JETT: For the record, Judge, Doctor Myers was here for Joycelyn's testimony and for Ms. Dixon's testimony,

THE COURT: All right.

MR. JETT: Q. And based on that testimony, plus what you have heard, can you tell us if she believed that she was under duress at the time that she purchased the firearms?

THE WITNESS: A. I don't know if I can make a legal conclusion, but I felt that she did not—She did not in her mind think there was any other choice.

Q. Okay. Now, we have gone over all of these things and we have talked about January the 3rd. All the same factors, were they operating on her for December 11?

A. Yes.

Q. Excuse me. January 11. So we are talking about January 3rd and January 11.

A. I think it was the 4th and the 11th.

Q. Right. That is correct. I am sorry. For the 4th and the 11th, were all the same factors working on her for the purchase of all of the guns?

A. Yes.

Q. Was her motivations the same?

A. Yes.

Q. Was her state of mind the same?

A. Yes.

[759] MR. JETT: I think that all I have.

THE COURT; Ms. Heath, anything you want to add?

MS. HEATH: I believe for a proffer it is not necessary to cross examine a witness.

THE COURT: It is not.

MS. HEATH: Nor object during the testimony so the defense has a full opportunity to present its evidence.

THE COURT: Correct. Thank you, Doctor Myers. You may step down.

MS. HEATH: I guess for record purposes, though, we would request that Doctor Coons' report that the Court has already received be included in the record, just in an abundance of caution, so that all the testimony is available for expert testimony.

THE COURT: Yes. And that will be made part of the record. Anything else we need to address with respect to this bill?

MR. JETT: No. Your Honor.

THE COURT: Well, I think my ruling obviously will remain the same. This has confirmed—This is exactly what was being offered in the *Willis* case, and I think as Doctor

Myers stated, in her mind she didn't believe she had a choice. It is all subjective, and based on the circumstances from her past history I think that is exactly what the Fifth Circuit said in *Willis* is not admissible to establish a duress [760] defense. So I think my ruling will remain the same. You have your bill.

Let's take a break. Why don't we do the charge conference this afternoon? We will go ahead and stay here. Take a break and come back on into the conference room. I have a draft prepared. I may want to make a few changes. And we will give you each a copy, and we will go on and give you a chance to read it and go on into the charge conference.

MR. JETT: How soon would you like us there?

THE COURT: Say about 15 or 20 minutes. Come back in and check with us. Let's do this. Check back about a quarter till 5:00, and we will see if we have it ready, All right. We will be in recess.

(Brief Recess)

THE COURT: All right. On the record. After both parties have rested and closed, one of the parties resting under protest, but both parties have rested and closed, and outside the presence of the jury, I have prepared a court's charge to the jury, and the parties have been given an opportunity to read it.

Ms. Heath, we will begin with you as far as objections, corrections.

MS. HEATH: Yes, Your Honor. On page six of the charge in the credibility of witness section, the Government's [761] submitted instruction included reminding the jury, especially in this case since the Defendant has testified, that the Defendant is a witness as well, such as in the second paragraph second sentence. "An important part of your job will he making judgments about the testimony of the witnesses

who testified in this case," to "witnesses, including the Defendant, who testified in this case."

And then at the end of it the Government recommended a sentence, "the testimony of the Defendant should be weighed and his or her credibility evaluated in the same way as any other witness."

THE COURT: Okay.

MR. JETT: Judge, I would disagree with that because it focuses on the Defendant. It makes the Defendant look different than another witness. And I think it is clear to the jury that she was a witness and a witness for all purposes. And to put those provisions in would focus them on her and make her different. I think the point is to make her be viewed just like any other witness. And so I would disagree with Ms. Heath, and I think that your charge on credibility of witnesses is fine.

THE COURT: Okay. I don't mind, "You are the sole judges of the credibility or believability of each witness, including the Defendant," because as you get down in some of the others did they have a relationship with the Defendant, and [762] they may tend to exclude the Defendant. So usually we put something in there about the Defendant.

MS. HEATH: Right. Because throughout the document we refer to the witnesses and then we refer to the Defendant. So there are definitely different titles given to those individuals.

MR. JETT: I will object to that.

THE COURT: Well, your objection is noted. So I will put that up in that sentence "You are the sole judges of the credibility or believability of each witness, including the Defendant, and the weight to be given the witnesses' testimony." And the rest of it should flow from there. All right.

MS. HEATH: Page seven, the very last sentence in the impeachment by prior inconsistencies need not be there.

THE COURT: Take that out. Okay.

MS. HEATH: Page 12, the title really should read "Acquisition of a firearm by a person under indictment."

THE COURT: That is true.

MR. JETT: I agree with that.

THE COURT: Okay.

MS. HEATH: And then page 13, actually the possession charge is really not relevant in a situation where it is an acquisition of a firearm, especially since it is not even a contested issue at this point.

[763] THE COURT: Okay. Do you just want to leave that out, then?

MS. HEATH: I would say it is extraneous.

THE COURT: Mr. Jett?

MR. JETT: I like the way it is.

THE COURT: What is it relevant to? Where else do we use possession?

MR. JETT: If I may just have a moment.

THE COURT: Of course, that came out of your requested—

MS. HEATH: I know.

MR. JETT: If the Government asked for it, Judge, I think they should be bound by it. I think they should be estopped and charged equitable estoppel here. Laches have a comeback in the law, so I don't see why we can't apply it in this situation.

THE COURT: Okay. I think we can omit that.

MR. JET: Can I have a moment to look at the indictment, Judge, before we finally decide?

THE COURT: Sure.

MR. JETT: I don't have any further comment.

THE COURT: Okay. I will remove that. I don't see that that is relevant to the specific charge. Okay.

MS. HEATH: With regard to page 17, the duress instruction, first, we just renew our objection to including a [764] duress instruction on here, based on the fact that the Government does not believe that the Defense has established by an objective standard any of the elements of duress in order to present it to the jury. And therefore, we believe that this is not a proper instruction to give to the jury at this time since the defense truly has not convinced the Court of the fact that each of these elements has been reached when viewed in an objective standard.

THE COURT: Okay, I am going to go ahead and give it. And certainly I have been thinking about it. It is frankly a close call in my mind, but when it is a close call, better to give it than not.

MS. HEATH: Then we would request that it be the standard Fifth Circuit duress instruction, which is worded I believe a little bit different than this.

THE COURT: Where?

MS. HEATH: Well, regardless of the Fifth circuit standard, let me refer you first to on page 17, the third paragraph down, "If the proof should fail to establish by any essential element of the Plaintiff's claims," and that should be the Defendant's claims, and I don't have—The standard instruction that I have does not even have that sentence, so I don't know how to correct—

THE COURT: That comes out of a civil case. That is where she pulled this out of.

[765] MR. McLAIN: It doesn't even make sense if you change plaintiff to defendant anyway.

MS. HEATH: That is why I am having a hard time even with the introduction of it. It is my understanding with the Fifth Circuit charge, it indicates that "If you conclude the Government has proved beyond a reasonable doubt that the Defendant committed the crime as charged, you must then consider whether the Defendant should nevertheless be found not guilty because her actions were justified by duress or coercion."

In this it does not even indicate that the jury needs to consider whether or not the Defendant—whether the Government has proved the other elements of the crime to get to the duress. So they could potentially not even address the elements of the underlying offenses and go right to duress, where they really need to consider the elements of the offense first before they then consider the elements of duress.

THE COURT: Okay, Now, the four elements, are those okay?

MS. HEATH: The four elements in what I have printed out are a little easier I think to read in their description.

THE COURT: Okay. Well, let's go back up to this.

MR. JETT: Are we talking about the elements or are you looking at something else?

THE COURT: I am still dealing with this first part [766] of the charge.

MR. JETT: I will have a comment on the elements, but if you are going to deal with that, I will certainly wait on that.

THE COURT: Well, I think one way we could do that, that third paragraph, just eliminate that entirely. That is something that we put in a civil case. What about that, Mr. Jett? Because of that sentence "If the proof should fail to establish any essential element"—

MR. JETT: I agree with that. We are not plaintiffs. And I may be a defendant, but we don't have plaintiffs, and so—Let me read the rest of the paragraph again. Well, if we are looking at the third paragraph, I agree to take out the part about, I guess the last sentence. Rut the first sentence is—Really I don't see that it is a problem. All it says is "you can consider the testimony of all of the witnesses regardless of who may have called them."

THE COURT: We have already told them that, thought, in the previous section, so I don't see that as necessary here. In either a separate paragraph or the credibility of witnesses paragraph we tell them to consider all of the testimony. So see that as unnecessary here. I will just eliminate that.

Okay. Let's get down to the elements. And of course, these come out of that *Willis* case, I think, pretty much. I like your fourth one better because it doesn't have that direct [767] causal relationship.

MS. HEATH: That fourth one is very confusing. This is a simpler one.

THE COURT: Take a look at that.

MS. HEATH: And one minor thing about the duress charge. "The defendant" is capitalized throughout, and in the rest of the charge the defendant is in small case. I don't know whether you care about that, but it is just not consistent.

THE COURT: Okay.

MS. HEATH: I don't mind emphasizing that the Defendant has the burden of proof in this.

THE COURT: Mr. Jett, what do you think?

MR. JETT: I prefer the one out of *Willis* for two reasons. One, number four says, "a reasonable person would believe," and that is not in the *Willis* charge.

THE COURT: It says "can be reasonably anticipated."

MR. JETT: I understand can be reasonably anticipated, but I anticipate that there will be an argument that she is not a reasonable person, for whatever reason, and think the *Willis*—Because it doesn't go to her. It just says there is a direct causal relationship.

Now, the other objection I have is where it says "committing the criminal action he would directly avoid the threat and harm." And again, that is not in the *Willis* case, [768] and the "directly" bothers me, because—

THE COURT: Where are you?

MR. JETT: I am on four.

THE COURT: Still on the Government's proposed?

MR. JETT: Yes.

THE COURT: Okay.

MR. JETT: And that bothers me, because part of the Government's cross, and I anticipate the argument will be that, you know, there wasn't going to be immediate harm to her right there in the gun show, and so, therefore, there is not duress. And I am afraid that they will take this directly to mean that we have to prove that she was going to be harmed right there. That is why I like the one in *Willis* better, because it doesn't put really a time limit on it, and this seems to. And I think that is detrimental to my client.

THE COURT: *Willis* does to a certain extent, because that is part of the first element—"imminent and impending threat."

MR. JETT: Right. But it is in that element. I don't want to put it back down here.

THE COURT: How do you see that it puts it in that?

MR. JETT: I guess I didn't make myself clear. It says that he would directly avoid the threat and harm. The word

"directly" is the problem, because I think "directly" could be taken as it would avoid her being harmed right then, [769] and the testimony was "I was afraid he would either call and have my kids hurt or when we got home he would do something to us."

THE COURT: So you see that as being a time rather than a relationship.

MR. JETT: Yes, sir, I do. That is correct. And so I don't want to have that time issue in there.

Now, if we were to say that instead of a reasonable person, just that a person would believe that by committing the criminal action he would avoid the threat and harm—

THE COURT: I am going to leave reasonable in there, because it is objective. What about leaving out the "directly"?

MS. HEATH: Well, the fourth element as proposed in the charge talks about a direct causal relationship, so that is where the "directly" comes from. They are just saying it a different way.

THE COURT: I see that, too, as direct meaning relationship, meaning commit the crime you avoid the harm. That is the direct, rather than some kind of time requirement as you are reading it.

MR. JETT: Well—

THE COURT: I mean, the Government may well argue—I don't know what they are going to argue. They may want to argue that she wasn't afraid—But I think that goes to [770] element one, that she wasn't afraid that they were going to shoot her at the gun show, then somehow she didn't have any imminent or impending threat. But I see that as going to element one.

MR. JETT: And I understand that. But to me it seems it is different to say there is a direct causal relationship as opposed to directly avoiding the threat and harm.

THE COURT: I think it is saying the same thing; just another way of saying it.

MR. JETT: Well, I prefer the fourth element in the *Willis* case.

THE COURT: I am going to give it the way the Government has it. I think to the jury that would be easier for them to understand. And I think it says the same thing. "Direct causal relationship could be reasonably anticipated" —so we have to leave reasonably in there—"between the conduct alleged to be criminal and avoidance." So that is the causal relationship.

MR. JETT: Can I speak to the "reasonable" thing?

THE COURT: Yes.

MR. JETT: Again, element four, it says that a direct causal relationship may be reasonably anticipated, but it says the causal relationship would be reasonably anticipated. It doesn't talk about that you have to find the individual to be reasonable. Now, I mean, I think—

[771] THE COURT: Because that is not the issue that the individual, whether she is reasonable or not. The issue is what a reasonable person would have thought. That is the issue.

MR. JETT: I understand. But that is not the element, that is not the fourth element. That is not what it says. The fourth element doesn't speak to whether the person is reasonable or not reasonable. It speaks to a reasonable relationship between the criminal action and the avoidance of a harm. It doesn't talk about a person. It talks about a relationship, a causal relationship between the criminal action taken and the avoidance of harm. It doesn't deal with a person at all.

THE COURT: I think it does by saying "could be reasonably anticipated." I will overrule that objection. I will leave "reasonable" in there, and I will just grant the one the

Government has. And you have your objection. You objected to that. I will hold on to this for a second while I make that.

MS. HEATH: My final objection is to actually the bulk of the remainder on page 18, which appears to go directly to—

THE COURT: It has a lot of subjective—I have made some changes on it as I was looking at it while you were looking at it. It is pretty much what I think Mr. Jett had requested. And so that is what I have put in there as the [772] draft. But as I started reading it, it occurred to me there were a lot of subjective components to it. So we will have to change that.

MR. JETT: Can I speak to that, Judge?

THE COURT: Uh-huh.

MR. JETT: That language is taken right out of the footnote of *Willis*.

THE COURT: Part of it; not all of it. And certainly it is—You know, like that first sentence, "In determining whether the elements of duress are met, you may take into account the situation." The footnote says "objective situation."

MR. JETT: Then you can put objective situation to that and I wouldn't object to it,

THE COURT: I am. I am going to put that in there. But I think there are some other problems. Towards the bottom, "You must consider the circumstances from the perspective of the accused, taking into consideration her life circumstances, her past history." Now, with her past history with a person alleged to have made the unlawful threat, I think that is all right, although as I read that footnote—I am just throwing this out, and see what you think and you think about it—that is where it seemed to me that the past history, her past relationship and past history with Wright goes to that well-grounded apprehension, that fear that has to be a [773] reasonable fear. You take into account that relationship. But

then that footnote goes on to explain what may appear to be irrational in a vacuum may not be irrational given the person's relationship.

I was contemplating putting that language pretty much from the footnote, but in connection with directing the jury's attention to the reasonable well-grounded tear. And they can take that. That is where I think that is relevant. It is still an objective determination, but seeing the evidence as they find it to be based on her relationship with Wright.

MR. JETT: That is kind of—That is the way I interpret the footnote. But like I said, I like the way it is written in the proposed charge. Like I said, it is taken from what I proposed, and it is my request to do it that way.

THE COURT: What specific changes did you have in mind? Do you have any?

MS. HEATH: Yes, Your Honor. For one, it continually refers to the Defendant as opposed to a reasonable person or an objective person. I think the Court should consider replacing some of the verbiage in here, such as three sentences down, "In order to show the Defendant's alleged illegal conduct as a result of duress or coercion, it must be shown that the Defendant's fear was well-grounded when considered to be in the shoes of a reasonable person or considered objectively."

I would continue with the next sentence, "The fear may [774] appear to be irrational," and it continues to talk about "Defendant's experience with the person applying the threat." I would not continue the sentence where it says, ". . . or other prior life circumstances of the Defendant," since that is going on beyond this particular relationship, and I don't think that that is relevant to what *Willis* was trying to establish—that you cannot go into that type of prior history because it is totally subjective.

I don't think it is necessary to put in the next sentence where it talks about, "It is not necessary, therefore, for there to be proof that the Defendant did not recklessly or negligently place herself in a relationship with the person making the threat." I don't think that whole sentence is necessary, because simply stated, element two of the offense itself says "The Defendant had not recklessly or negligently placed herself in a situation where it was probable that she would be forced to choose a particular criminal conduct with which she is charged. So it refers you back to the specific criminal conduct. So I don't think it is necessary to further explain that, because it is a fairly self-explanatory element. I don't think you need an additional explanation for that.

MR. JETT: Can I speak to that?

THE COURT: Yes.

MR. JETT: The reason I put that in there, Judge, is because I think it is anticipated, and I think based on the [775] testimony, there is going to be a tendency of the jury to think that she was reckless or negligent for being involved with this guy to begin with, and I think they need to be instructed to separate out essentially their opinions about her choices in men and her qualities as a mother versus whether she reasonably anticipated that her choices would put her in a situation where she would be perhaps required to engage in criminal conduct. I think those are two very different things, particularly based on the evidence where what we have is that, while there were problems in this relationship, and certainly there were some problems with Mr. Wright, or maybe we should call him Mr. Wrong, but be that as it may, I don't think until he pulled out the gun and started pointing it at her that she thought she would reasonably, you know, have dealings with guns. I know she did find the shotgun, but he took that away at her request.

I don't think there is anything in the evidence at all that would have caused her to reasonably believe he was going to

make her buy guns at some point until he came in with the gun, woke her up, and said, "We are going to go buy guns tomorrow."

So I think that the jury needs to be—It needs to be explained to them, they need to make a distinction between those two things. Because otherwise, I am afraid, based an the things the government did about talking about her relationships and the things she hadn't done, that they are just going to [776] say, "She is a bad mom, she doesn't take care of her kids, she has made bad decisions, she is put in bad circumstances; therefore, we are going to find her guilty," without focusing on whether or not she was negligent and getting herself involved in a gun sale.

THE COURT: Okay. All right. Any other objections?

MS. HEATH: I think you already mentioned in the second to the last sentence here about circumstances—

THE COURT: What I have written, "In determining whether or not you believe the Defendant had a reasonable legal alternative to violating the law, you must consider what an objectively reasonable person would have done in the same circumstances." That ties it back into a reasonableness, something similar.

Let's do this. I actually had made quite a few changes here, Let me go back and do it the way I think it needs to, because I think it has enough subjective components here that need to be eliminated, and I want to reword it just a little bit. Let me change that, and I will present that to you, and you can just object to that.

Any other objections from the Government?

MS. HEATH: No, Your Honor.

THE COURT: Mr. Jett, anything?

MR. JETT: Yes, sir.

THE COURT: Other than the duress right now?

[777] MR. JETT: Obviously I am going to object to those changes, but the only other objection I have is placing the burden of proof on the Defendant by a preponderance of the evidence to prove duress. I contend that the Defendant should have the burden of production, and then that the Government should be required to disprove beyond a reasonable doubt the duress.

And I understand what the Fifth Circuit has said, and I have cited to the Court authorities from other circuits. There is apparently a substantial split in the circuits as to who has the burden in this situation. And respectfully to the Fifth Circuit, I disagree with them, and ask the Court to submit a charge that would place the burden on the Government to disprove duress beyond a reasonable doubt, and as I have stated in my requested charge.

THE COURT: And I will, of course, deny that request. I can't overrule the Fifth Circuit. I am under their authority. And that is what they said is the law, so that is what we will include in the charge here.

Let me make this change and give you the opportunity to look at it on the duress, the changes I am going to make, and then we will take those objections, and we should be through, then.

(Brief Recess)

[778] THE COURT: If you will look on the first page of that duress, the fourth element, of course I have changed it like we discussed to what the Government proposed. I added that first sentence. That is new. "These requirements are addressed to the impact of a threat on a reasonable person." That is out of the *Willis* case, and that was not in the first proposed charge.

And then in the second sentence, the very last sentence of that page I added "objective" right before "situation," which is also out of *Willis*.

And the second page, it is harder to point out. I reordered some things, but added some language about the reasonableness, what I think is an objective test. And Ms. Heath, any objections to the duress?

MS. HEATH: Without waiving the Government's entire objection to the duress element—

THE COURT: You already have that one; yes.

MS. HEATH: Only two things. One, the first comment I had made about the fact that the charge does not tell the jury that they need to consider whether or not the Government has proved the elements of the offense first before they consider the duress defense.

THE COURT: That is what you have there, isn't it?

MS. HEATH: And then the second thing, in the element number four that you changed, it does say "he" instead of [779] "she," and that would be the only correction.

THE COURT: Yes, In the fourth element?

MS. HEATH: Yes.

MR. JETT: I would agree with that, Judge.

THE COURT: And I probably will add this language, then, as is here, probably right after the second sentence at the very top. "If you conclude that the Government has proved beyond a reasonable doubt that the Defendant committed the crime as charged, you must then consider whether the Defendant should nevertheless be found not guilty because her actions were justified by duress or coercion." That is what you are proposing?

MS. HEATH: I think it makes it clearer to the jury that it is not that they have to consider all of the charge at one time; that they need to address the elements of the offense first, and then if they determine the Government has proved its burden—

THE COURT: That is only when you go to duress, if they find her guilty otherwise. Do you have any objections to that?

MR. JETT: I don't.

THE COURT: Okay. I will put that in there right after the second sentence at the very beginning of the duress, Okay.

All right. And then we change the "he" to "she" on the [780] fourth element. Anything else, Ms. Heath?

MS. HEATH: That is all I have.

THE COURT: Mr. Jett?

MR. JETT: Nothing other than to reassert my prior objections.

THE COURT: You have those on the record.

MR. JETT: The only other thing I would—That is all on that matter, then.

THE COURT: On the duress?

MR. JETT: On that part of the duress. I would like to say one other thing about the burden of proof on it, that the Tenth Circuit's case on duress where it places a burden on the Government does rely on a U.S. Supreme Court case called *United States versus Bailey*, and I understand the Fifth Circuit is how it is, but T wanted to point that out to the Court and to the Circuit if they ever read this, and that there is some U.S. Supreme Court authority as well as other circuit authority that differs and would place the burden of proof on the Government on the duress issue.

THE COURT: All right. Any other objections, then?

MR. JETT: No, sir.

THE COURT: All right. With that we will just go ahead and call it a night. Come back in the morning about a quarter till. We will have the changes made on page 16, then. Adding that paragraph, that probably will affect 17 a little [781] bit.

But those are the only two changes we will make, adding that sentence and then changing the "he" to "she." Everything else will remain the same.

I won't take any new objections in the morning. If there is a typo or something that you catch, I will certainly hear that, but no new objections. This is it. So anything else?

MS. HEATH: Nothing else from the Government, Your Honor?

THE COURT: Mr. Jett, anything else?

MR. JETT: Nothing else.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Nov. 20, 2003]

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No. 3:03-CR-055-P

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UNITED STATES OF AMERICA,
*Plaintiff,*

v.

KESHIA CHERIE ASHFORD DIXON,
*Defendant.*

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## *COURT'S CHARGE TO THE JURY*

MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then, I will give you some specific rules of law about this particular case; and finally, I will explain to you the procedures you should follow in your deliberations.

## *DUTY TO FOLLOW INSTRUCTIONS*

You, as jurors are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors and they have the right to expect nothing less.

*PRESUMPTION OF INNOCENCE—BURDEN OF PROOF—REASONABLE DOUBT*

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, a defendant is presumed by the law to be innocent. The government has the burden of proving that a defendant is guilty beyond a reasonable doubt, and if it fails to do so, you must acquit that defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning that defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If your are not convinced, say so.

*EVIDENCE—EXCLUDING ARGUMENT OF COUNSEL AND COMMENT OF COURT*

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses, the exhibits and stipulated facts. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, do not assume from anything I have done or said during the trial that I have any opinion concerning any of the issues in the case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

*EVIDENCE—INFERENCES—DIRECT AND CIRCUMSTANTIAL*

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and, you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is testimony of one who asserts actual knowledge of a fact, such

as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

### *SUMMARIES & CHARTS RECEIVED IN EVIDENCE*

Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.

### *CREDIBILITY OF WITNESSES*

I remind you that it is your job to decide whether the government has proved the guilt of each defendant beyond a reasonable doubt. In doing so, you must consider all the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness, including the defendant, and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say and how important that testimony was. In making that decision I suggest that you ask yourself a few questions. Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the

considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

*IMPEACHMENT BY PRIOR INCONSISTENCIES*

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter or by evidence that, at some other time, the witness said or did something or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and, therefore, whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

*CAUTION—PUNISHMENT*

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

## 309

### *ON OR ABOUT*

You will note that the indictment charges that the offense was committed on or about a specific date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date stated in the indictment.

### *EXPERT WITNESS*

During the trial you heard the testimony of witnesses who were identified as expert witnesses. If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

### *CAUTION—CONSIDER ONLY CRIME CHARGED*

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of each crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

## COUNT I

## ACQUISITION OF A FIREARM BY A PERSON UNDER INDICTMENT (18 U.S.C. § 922(g)(1))

Title 18, United States Code, Sections 922(n) makes it a crime for a person under indictment for a crime for which he may be imprisoned for more than one year to acquire a firearm.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant knowingly received a firearm, as charged. The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device;

*Second*: That when the defendant received the firearm, the defendant was under indictment for a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense; and

*Third*: That the receipt of the firearm was in or affecting commerce; that is, that before the defendant received the firearm, it had traveled at some time from one state to another.

## 1.37
## "KNOWINGLY"—TO ACT

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

## 1.39
## INTERSTATE COMMERCE—DEFINED

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory possession of the United States, including the District of Columbia.

## COUNTS 2 - 9
## FALSE STATEMENT TO FIREARMS DEALER
## (18 U.S.C. § 922(a)(6))

Title 18, United States Code, Sections 922(a)(6) and 924(a)(2), make it a crime for anyone to make a false statement to a firearms dealer in order to buy a firearm.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant made a false statement while acquiring a firearm from a licensed dealer;

*Second*: That the defendant knew the statement was false; and

*Third*: That the statement was intended or was likely to deceive about a material fact, i.e., one which would affect the legality of the sale to the defendant.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

A statement is "false or fictitious" if it was untrue when made and was then known to be untrue by the person making it.

A false statement is "likely to deceive" if the nature of the statement, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.

## DURESS—ELEMENTS

In this case, the defendant has offered evidence to show that at the time of the purchase of the firearms she was acting under duress or coercion. If a person commits an offense while under duress or coercion that person is not guilty. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should nevertheless be found "not guilty" because her actions were justified by duress or coercion.

The defendant has the burden of proof to establish the defense of duress by a preponderance of the evidence. Preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

To establish the defense of duress or coercion the defendant must prove each of the following by a preponderance of the evidence:

> *First*: That at the time of the conduct in question the defendant was under unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury to herself or to another;

*Second*: The defendant had not recklessly or negligently placed herself in a situation where it was probable that she would be forced to choose the particular criminal conduct with which she is charged;

*Third*: That the defendant had no reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and

*Fourth*: A reasonable person would believe that by committing the criminal action she would directly avoid the threatened harm.

These requirements are addressed to the impact of a threat on a reasonable person. In determining whether the elements of duress are met you may take into account the objective situation in which the defendant was allegedly subjected to duress.

In order to show that the defendant's alleged illegal conduct was the result of duress or coercion, it must be shown that the defendant's fear is well-grounded, that is whether a reasonable person would have feared death or serious bodily injury to herself or to her children under the same circumstances. In deciding whether the defendant had a well-grounded fear, you may consider the immediate circumstances surrounding the purchase of the firearms as well as evidence concerning the defendant's past history with the person making the threats. A fear that seems irrational when viewed only in light of the immediate circumstances may be well-grounded if the defendant's experience with the person making the threats was such that she could reasonably anticipate harm to herself or to her children if she failed to comply.

With respect to the second element above, it is not necessary for there to be proof that the defendant did not recklessly or negligently place herself in a relationship with

the person or persons making the threat. It is necessary that there be proof that the defendant did not recklessly or negligently place herself in a situation in which it was probable she would be forced to unlawfully purchase the firearms alleged in the indictment.

In determining whether or not you believe the defendant had a reasonable legal alternative to violating the law, you must consider what an objectively reasonable person would have done in the same circumstances. Finally, you must find that the defendant reasonably believed that the alleged criminal conduct would avoid the threatened harm.

*DUTY TO DELIBERATE—VERDICT FORM*

To reach a verdict, all of you must agree. Your verdict must be unanimous as to each defendant and each count. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson

who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided for in each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

SIGNED this 20th day of November, 2003.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Nov. 20, 2003]

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No. 3:03-CR-055-P

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UNITED STATES OF AMERICA,
*Plaintiff*,

v.

KESHIA CHERIE ASHFORD DIXON,
*Defendant*.

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*JURY VERDICT FORM*

MEMBERS OF THE JURY:

COUNT 1:

We, the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 2:

We, the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 3:

We, the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 4:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 5:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 6:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 7:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 8:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

COUNT 9:

We the jury, find the Defendant:

(√) GUILTY or ( ) NOT GUILTY of the offense charged.

SIGNED this 20th day of November, 2003.

/s/ [illegible]
Foreperson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Dallas Division

[Filed Feb. 23, 2004]

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Case Number 3:03-CR-055-P(01)

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UNITED STATES OF AMERICA,
*Plaintiff,*

v.

KESHIA CHERIE ASHFORD DIXON,
*Defendant.*

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# JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, KESHIA CHERIE ASHFORD DIXON, was represented by J. Craig Jett, Esq. The United States was represented by Assistant U.S. Attorney Candy Heath.

The defendant was found guilty on Counts 1 through 9 by a jury verdict on November 20, 2003, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

| Title & Section | Nature of Offense | Date of Offense | Count Number(s) |
|---|---|---|---|
| 18 U.S.C. § 922(n) | Acquisition of a Firearm While Under Indictment | January 2003 | 1 |
| 18 U.S.C. §§ 922(a)(6) & 924(a)(2) | False Statement to Purchase a Firearm | January 4, 2003 | 2, 3, and 4 |
| 18 U.S.C. §§ 922(a)(6) & 924(a)(2) | False Statement to Purchase a Firearm | January 11, 2003 | 5 through 9 |

As pronounced on February 18, 2004, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $900, for Counts 1 through 9, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 23rd day of February, 2004.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-FOUR (34) MONTHS on each count to run concurrently with each other. This sentence is to be served consecutively to the sentence imposed in Case No. 3:01-CR-385-P(02). Defendant is to be given credit for time served after the completion of the sentence in Case No. 3:01-CR-385-P(02).

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delievered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each count to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☑ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the U.S. Probation Officer.

The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the U.S. Probation Officer.

The defendant shall provide to the U.S. Probation Officer any requested financial information.

The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing

for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (co-payment) at a rate of at least $10 per month.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 04-10250

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

KESHIA CHERIE ASHFORD DIXON,
*Defendant-Appellant*.

---

June 20, 2005

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Appeal from the United States District Court
for the Northern District of Texas

---

Before REAVLEY, JOLLY and PRADO, *Circuit Judges*.

E. GRADY JOLLY, *Circuit Judge*:

This case may have added interest because the defendant introduced evidence concerning battered woman's syndrome as part of her duress defense. Otherwise, this appeal is unremarkable. The appellant, Keshia Cherie Ashford Dixon, was convicted of one count of receiving a firearm while under indictment and eight counts of making a false statement to purchase a firearm.[1] In appealing the conviction, she contends that the district court erred in: (1) refusing to permit expert testimony in support of her defense of duress; (2) excluding as hearsay an out-of-court statement made by her former boyfriend to an ATF agent; and (3) instructing the jury that

---

[1] *See* 18 U.S.C. §§ 922(n) and 922(a)(6).

she bore the burden of proving her defense of duress by a preponderance of the evidence. We find no reversible error, and thus AFFIRM.

I

Two Dallas gun shows are the situs of the crime. The relevant facts, occurring in January 2003, are largely undisputed. At both of the gun shows, Dixon purchased multiple firearms by providing false information to dealers. In particular, she provided an incorrect address and stated that she was not under indictment for a felony, when in fact she had been indicted for her role in a check cashing scheme. In each instance, the dealer ran Dixon's information through the National Instant Criminal Background Check System, received a "proceed" response, and sold Dixon the gun.

At trial, Dixon attempted to raise a defense of duress, claiming that she had been coerced into purchasing the guns by her boyfriend, Thomas Earl Wright, and an associate, Hookie Sanders. Both Wright and Sanders were convicted felons, so neither could purchase the guns directly. Each of the gun dealers testified that Dixon was accompanied by several men while at the gun shows, but that they did not seem to be controlling her purchases.

Dixon testified that she had been abused by Wright, who allegedly beat her on a regular basis and threatened her children. Her description of the relationship was largely corroborated by the testimony of her two daughters. Dixon further testified that she was afraid that, if she did not buy the guns for Wright, he would harm or even kill her or her daughters.

In support of her duress defense, Dixon attempted to introduce the testimony of Dr. Toby Myers, a domestic violence expert, regarding the reactions of battered women to their abusers. The court held that Dr. Myers's testimony addressed Dixon's subjective state of mind and was therefore inadmissible to show duress. Dixon also attempted to intro-

duce the testimony of Kelly Oates, an agent with the Bureau of Alcohol, Tobacco and Firearms, concerning an out-of-court statement by Wright that he gave Dixon $115 to purchase a gun for him. The district court excluded Oates's testimony as inadmissible hearsay.

The jury convicted Dixon on all nine counts.

II

On appeal, Dixon contends that the district court erred in three respects: (1) in refusing to admit Dr. Myers's expert testimony; (2) in excluding Wright's out-of-court statement as inadmissible hearsay; and (3) in giving a jury instruction that placed the burden of proving duress by a preponderance upon the defendant.

A

We first consider whether the district court erred in excluding Dr. Myers's testimony concerning the psychological effects of Wright's battery of Dixon. We review a district court's decision to exclude expert testimony only for abuse of discretion. *See, e.g., United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir.1995).

Expert testimony is admissible if (1) it will assist the trier of fact to understand the evidence or to determine a fact in issue; (2) it is based on sufficient facts or data; (3) it is the product of reliable principles and methods; and (4) the witness has applied the principles and methods reliably to the facts of the case. FED.R.EVID. 702. In the case at bar, neither Dr. Myers's data nor her methodology have been challenged. The narrow question raised by Dixon is whether the district court abused its discretion in holding that Dr. Myers's testimony would not have assisted the jury in making a determination as to a material fact.

Dixon sought to introduce Dr. Myers's expert testimony in support of a defense of duress. Duress is an affirmative

defense that has been developed through the common law and adopted by the federal courts. *See United States v. Bailey*, 444 U.S. 394, 409-10, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). To succeed on a duress defense, this court requires that the defendant show:

> 1. that [she] was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
>
> 2. that [she] had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to choose the criminal conduct;
>
> 3. that [she] had no reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
>
> 4. that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

*United States v. Willis*, 38 F.3d 170, 175 (5th Cir.1994); (quoting *United States v. Liu*, 960 F.2d 449, 453 (5th Cir.1992)). Whether apprehension is "well-grounded" turns on whether "a person of reasonable firmness in [the defendant's] situation would have been unable to resist" the threat. *Id.* (quoting AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 2.09(1) (1985)). In short, the duress defense requires an objective inquiry into whether a defendant's conduct, although illegal, represented her only reasonable alternative to serious bodily injury or death.

1

Most of the expert testimony proffered in this case, like that in *Willis*, dealt with the defendant's subjective vulnerability to coercion. In *Willis*, we held that expert testimony that a defendant "suffers from the battered woman's syn-

drome" is "inherently subjective" and therefore inadmissible to support a defense of duress. *Id.* at 175, 177. In the case at bar, although Myers carefully avoided using the term "battered woman's syndrome", she nonetheless explained that Dixon was "more vulnerable because she had lost her job" and that Dixon "didn't think [calling the police] would do any good". Dr. Myers concluded that, as a result of Wright's threats and repeated battery, Dixon believed "in her heart and mind [that] she didn't have a choice" as to whether to buy the guns. In short, this testimony clearly focuses on Dr. Myers's opinions as to Dixon's individual state of mind.

To the extent that Dr. Myers's proffered testimony described Dixon's subjective perceptions of danger, it was not relevant to the inquiry at hand—that is, to whether such perceptions were "well-grounded" or objectively reasonable under the circumstances. As such, it could not have "assist[ed] the trier of fact" in making any determination of material fact. *See* FED.R.EVID. 702. Thus, we hold that the district court did not err in excluding this portion of Dr. Myers's testimony.[2]

---

[2] Furthermore, Dr. Myers's assertion that Dixon's fears were reasonable does not redeem her testimony. Whether a defendant's apprehension of harm is reasonable under the circumstances is ultimately a question for the jury. Although it is certainly possible that expert testimony might shed light on the reasonableness of a given type of conduct by describing typical reactions to unusual circumstances, such was not the case here. Instead, at the prompting of counsel, Dr. Myers offered the wholly conclusory assertions (1) that Dixon's fear of Wright was "well grounded" and (2) that her decision not to leave Wright was not "reckless or negligent".

These statements represent a transparent strategy to distinguish Dr. Myers's testimony from that which was excluded in *Willis* by inserting brief, perfunctory "objective" characterizations into testimony that otherwise focuses exclusively on the defendant's subjective perceptions. If the rule announced in *Willis*—i.e., that expert testimony as to a defendant's subjective beliefs is inadmissible to show duress—were so easily swept aside, it would be meaningless.

Our analysis does not end here, however. Dixon contends that Dr. Myers's proffer did not focus exclusively on subjective perceptions. Rather, Dixon argues, the proffer included a significant amount of "'objective' testimony that would show that [Dixon's] fear . . . was well-grounded in her history and experience with Wright". Although it is not altogether clear to us what Dixon means by "objective testimony", the record suggests that the term refers to testimony by Dr. Myers as to the facts of Dixon's relationship with Wright.[3]

Such testimony, Dixon contends, would be based upon, *inter alia*, "interviews with Dixon's mother and daughters, statements from Wright and Sanders to the government" and "the testimony of . . . Jocelyn Dixon". In short, it would be inadmissible hearsay. *See* FED R. EVID. 802-804. Dixon points out that the facts upon which an expert opinion are based "need not be admissible in evidence in order for the opinion or inference to be admitted". FED.R.EVID. 703; *see also United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir.1971) (en banc). The inverse of this statement, however, is not true. Where, as here, an expert's opinion testimony is inadmissible, the hearsay upon which that opinion is based is also inadmissible. Were it otherwise, designation as an "expert" would permit any such witness—regardless of her

[3] Another type of expert testimony that may be termed "objective" is that which describes the typical patterns, circumstances and effects of battery within an abusive relationship without attempting to draw any conclusions therefrom as to the subjective perceptions of a particular defendant. Since *Willis* was decided, various courts have recognized a distinction between such generalized testimony and "subjective" expert testimony that effectively diagnoses a particular defendant as suffering from battered woman's syndrome. *See, e.g., State v. Grecinger*, 569 N.W.2d 189, 196-97 (Minn.1997); *Scugoza v. State*, 949 S.W.2d 360, 363 (Tex.App.San Antonio 1997); *State v. Stringer*, 897 P.2d 1063, 1069 (Mont.1995).

qualification or the relevance of her testimony—to escape the ambit of the hearsay rules.

Thus, in view of the inadmissibility of Dr. Myers's opinion testimony, she is not a competent witness to testify as to facts of Dixon's relationship with Wright based solely on what others told her. We therefore hold that the district court did not abuse its discretion in excluding such testimony.

B

Dixon next argues that the district court erred in excluding, as inadmissible hearsay, potentially inculpatory statements made by Wright to Agent Oates. Shortly after his arrest, Wright told Oates that he and an associate had given Dixon $115 to purchase a .380 semiautomatic pistol for them, and had done so because they were convicted felons and could not buy the guns themselves. Dixon acknowledges that Oates's testimony concerning the statement is hearsay, but contends that it is nonetheless admissible as a statement against interest. *See* FED.R.EVID. 804(b)(3).

The hearsay exception for statements against interest applies only where (1) the declarant is unavailable; (2) the statement tends to subject the defendant to criminal liability, such that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement is corroborated by circumstances clearly indicating its trustworthiness. *See United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101 (5th Cir.1981). The district court assumed that Wright would refuse to testify, given the potentially incriminating nature of his statement. As such, the admissibility of Oates's hearsay testimony turned exclusively on whether Wright's admission was corroborated by circumstances indicating its trustworthiness.

We will uphold a determination as to the trustworthiness of an out-of-court statement "unless it is clearly erroneous". *United States v. Vega*, 221 F.3d 789, 803-04 (5th Cir.2000).

In this case, the district court based its decision to exclude Oates's testimony, in part, on a major inconsistency between Wright's account of events and Dixon's. Although Wright admitted in his statement to Oates that he gave Dixon money to purchase a gun for him, he also asserted that he went to the gun shows "at Dixon's request" to "show her which ones to purchase because she didn't know anything about guns". This directly contradicts Dixon's account, in which Wright and Sanders physically coerced her into going to the gun show with them.

The discrepancy between the two accounts goes to the very heart of the duress defense—that is, whether Dixon bought the guns under threat of violence. Thus, while Dixon contended that she acted under duress, she sought to introduce a state-ment that indicated she acted willingly and voluntarily. Faced with such a fundamental inconsistency, the district court did not err in excluding the statement.

C

Finally, Dixon contends that the district court erred in instructing the jury that she, as the defendant, bore the burden of proving her duress defense by a preponderance of evidence. Our circuit's law is clear on this point: "Since a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." *Willis*, 38 F.3d at 179. As such, Dixon's contention is meritless.

III

For the foregoing reasons, the conviction is AFFIRMED.

FEB 28 2006

No. 05-7053

IN THE

# Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 413 F.3d 520, 67 Fed. R. Evid. Serv. 630 (5th Cir. 2005).

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 20, 2005. JA 325. The Court denied a petition for rehearing and rehearing *en banc* on July 20, 2005. The petition for a writ of certiorari was filed on October 17, 2005, and granted on January 13, 2006. The jurisdiction of this Court rests on 28 USC § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant portions of the Gun Control Act of 1968, as amended, §§ 922 and 924, are included as an appendix to this brief.

Fed. R. Crim. P. 52(a) provides:

> **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

## STATEMENT OF THE CASE

In this case, petitioner's defense to firearms charges contended that she could not have formed the requisite criminal intent because she had no choice. She presented evidence that she was forced to engage in unlawful gun purchases by a boyfriend who repeatedly abused her and threatened the lives of her three daughters if she did not comply. The District Court, in accordance with Fifth Circuit precedent, instructed the jury that she had to prove her defense by a preponderance of the evidence, effectively converting her defense to the criminal intent element into a form of civil trial on that sole and dispositive issue in the case. The Fifth Circuit affirmed.

The Fifth Circuit's ruling is contrary to that of a significant majority of other circuits and states. In those courts, a defendant who asserts a duress defense must bear the burden of producing probative evidence. If that evidentiary burden is satisfied, the prosecution retains the burden of proving to the jury that the defense does not raise a reasonable doubt as to the defendant's criminal intent. The majority's is the better reasoned rule and is fully consistent with the development of federal and state common law in the last century. The majority rule also comports with this Court's interpretations of the requirements of the Due Process Clause in this context. As such, the majority rule brings a measure of fairness and integrity to confusing and conflicting conceptions of *mens rea* and affirmative defenses. For each of these reasons, the Court should reject the Fifth Circuit's anachronistic rule and reverse.

### A. The Charges Against Petitioner.

On March 3, 2003, a federal grand jury of the Dallas Division of the Northern District of Texas indicted petitioner on nine firearms charges. JA 13-17. Count One of the indictment alleged that while she was under indictment for a crime punishable by imprisonment for a term exceeding one

year (conspiracy to possess a counterfeit check), she received seven firearms that had been transported in interstate commerce, in violation of 18 U.S.C. § 922(n). Counts two through nine of the indictment each alleged that Petitioner made a false and fictitious statement to a licensed firearm dealer, which was likely to deceive the dealer, relating to a fact material to the lawfulness of her acquisition of seven firearms and attempted acquisition of an eighth firearm. The alleged false statement in each case was the answer "no" to a question on a required Bureau of Alcohol Tobacco and Fireams ("ATF") background-check form (Form 4473) that asked whether she was under indictment or information in any court for a crime for which she could be imprisoned for one year or more. Counts two through nine each charged a violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). JA 14-16. Petitioner entered a plea of not guilty to the indictment.

Prior to trial, Petitioner secured authorization from the District Court for funds to hire an expert to evaluate petitioner in order to determine whether she was a "battered woman" and whether that circumstance in her life had a bearing on the charged conduct. The defense hired Dr. Toby Myers to conduct an examination of petitioner and to evaluate her history and circumstances in relation to the firearm purchases. Through sealed, and unsealed motions, the defense informed the Court that Petitioner would contend that she purchased the firearms under duress.

Prosecutors received ample notice of the intended defense in accordance with the District Court's order to do so pursuant to Rule 12.2(b), Fed. R. Crim. P.[1] JA 18-20.

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[1] Fed. R. Crim. P. 12.2(b):

Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney

Defense counsel gave notice by letter, further informing the prosecution that the defense intended to call Dr. Myers as an expert to testify on domestic violence and how it affects its victims. *Id.* Prosecutors then retained their own expert and moved for a compulsory examination of petitioner by that expert. Over defense objection, the District Court granted the motion. Petitioner complied under a District Court's threat that if she refused, the court would exclude the testimony of her own expert.[2]

### B. Petitioner's Trial.

#### 1. Prosecution Witnesses

The prosecution's evidence included the testimony of government attorneys who described for the jury the operation of the National Instant Criminal Background Check System ("NICS") and the function of ATF Form No. 4473 that is required for purchases from federally licensed gun dealers. SF 142-98.[3]

Prosecutors also called as witnesses each of the seven dealers from whom petitioner and her immediate companions, including her boyfriend, had purchased guns and the dealer from whom they had attempted to purchase another. Three of the sales occurred at a gun show at Market Hall in Dallas on

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for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

[2] The District Court later excluded Dr. Myers' testimony on the ground that it was "subjective." JA 253, 286-87. Accordingly, neither expert testified.

[3] Petitioner's citation form reflects the unusual lexicon of the Northern District of Texas and is as follows: SF is Statement of Facts (transcribed testimony and court proceedings); Tr. is Transcript (the record of pleadings, orders and other entries kept and prepared by the clerk of the court); Supp. Tr. (supplemental transcript); Doc. is document (numbered by the clerk when they are filed).

Saturday, January 4, 2003. The remaining four guns were purchased just one week later, January 11, at a similar gun show in Mesquite, Texas. The attempted purchase also occurred at the later gun show. That transaction was not completed because NICS instructed the dealer to delay the sale of the firearm. SF 410, 414, 417. Each and every one of the dealers who testified regarding petitioner's gun purchases and attempted purchase recalled that petitioner was accompanied by two or three young black males. JA 63, 65, 68- 69, 71- 72, 76- 78, 78-79, 81-82, 90-91, 92-94, 99-101, 102, 103.

Additional prosecution witnesses gave further support to the defense. Petitioner's landlord at the time of the gun purchases testified that petitioner lived at the Fall River Apartments along with her three children from December 2002 to sometime in February 2003. The landlord further testified that although the petitioner and her children were supposed to be the only persons living in the apartment, there were always young black men in and around the apartment. The landlord also testified that there was a patio window broken by a gun shot while petitioner lived in the apartment. SF 200-08. In addition, an ATF agent testified to a search of petitioner's apartment that yielded gun boxes and receipts connected to the purchases at issue, but none of the guns themselves.[4] There was no indication on the items that they belonged to petitioner. SF 257.

The parties stipulated that petitioner was under indictment and was aware that she was under indictment for a crime punishable by imprisonment for a term exceeding one year on the date of the sales and the attempted purchase.

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[4] When Petitioner was arrested, she told the agents there were three guns in her apartment because she had seen them three days before and did not know them to have been carried out of the apartment. Petitioner testified that the guns, the ammunition and the boxes all belonged to her boyfriend, Wright, and his accomplice. JA 194-95.

### 2. Defense Witnesses

The defense witnesses at trial included petitioner and two of petitioner's three daughters, aged 16 and 14 at the time of trial. Petitioner's daughters testified that their father and petitioner's former husband, Ted Dixon, had beaten and abused all of them. JA 131, 147-48. Petitioner divorced Dixon in 2001. JA 155. In August 2002, petitioner became romantically involved with Thomas Earl Wright, whose nickname is "Pacman." The girls testified that Wright and the petitioner got along well at the beginning, but the relationship became abusive. Wright would hit petitioner repeatedly and leave her stranded at home by taking her car and what little money she had. The girls and petitioner also testified that Wright administered his beatings in such a way as to hide the resulting marks, by hitting petitioner on her arms, legs and chest. Petitioner's clothes would cover the bruises. JA 108-10, 133-35. The testimony also established that petitioner ended the relationship, but that it later resumed on or about December 2002. *Id.*

All three defense witnesses testified to a significant increase in Wright's abuse of petitioner in connection with the gun shows in early January 2003. Petitioner explained that in late December or early January she overheard Wright and his friends talk about murders in which they had been involved. She had no idea that they had been involved in this sort of thing. JA 166-67. As petitioner and Wright's relationship deteriorated in January, Wright beat her more and she was not able to come and go by herself. Her daughters confirmed that petitioner had to be accompanied wherever she went by Wright or one of his friends. Her daughters testified that they were deeply frightened of Wright and his accomplices. JA 110-114, 135-38.

On the Friday night before the first gun show, Wright told petitioner that she was going to go with him and that she was going to buy some guns for him. Petitioner refused, which resulted in her being hit in the mouth, having a gun pointed at

her face and being threatened with death. JA 169-71. Wright's actions marked a significant escalation in the level of violence against petitioner. Wright told petitioner that if he had to kill her, he was also going to have to kill her children. *Id.*

The next day, petitioner, Wright, Wright's sister and two of his accomplices went to the gun show at Market Hall in Dallas. The children stayed at home. JA 171-72. When they arrived at the gun show, Wright instructed petitioner to do what he had told her to do. He warned her that somebody was at home with her kids and these individuals were just a phone call away. Petitioner testified that she was afraid and did not know what to do. JA 171. Wright and one accomplice, Cory "Hookie" Sanders, were with her and told her what to buy and to fill out the forms the way she was told. JA 172-73. Petitioner believed that if she did not buy the guns, Wright would hurt or kill her and/or her children. JA 175-77. Petitioner testified that she did not like buying a gun, had never owned a gun, had never shot a gun and did not want guns at her house. JA 178. Her daughters both testified that they had not seen their mother with a gun and that the guns belonged to Wright and his accomplices. JA 113-14, 135-36.

One of the purchases was a Tec-22 with a red laser. JA 175-76. In the week following the first gun show, Wright repeatedly pointed the Tec-22 at petitioner and her middle daughter, Joycelyn, in order to intimidate them. The eldest daughter, Queshia, testified that Wright would point the laser at petitioner and Joycelyn, and ask questions like "What do you know about this red dot?" JA 112. Joycelyn testified to Wright's use of the weapon in this fashion. Joycelyn also testified that when Wright pointed the red dot at her, he was pointing the gun at her. JA 136.

Petitioner also testified that Wright repeatedly trained the Tec 22 upon her, saying things like: "You don't think I will kill you, do you?" JA 179. Sometimes the gun was pointed

at her face and sometimes her chest. Petitioner was also present when Wright pointed the gun at her daughter. Petitioner testified that she was beaten four or five times that week, and that Wright would not allow her to go places by herself or to use the telephone. Petitioner testified that she was afraid to tell anybody about the abuse because she did not want anything to happen to her children. JA 178-80.

On the following Saturday, Wright awakened petitioner with a gun pointed at her. JA 180-81. Wright demanded that petitioner accompany him and another of his accomplices, Roderick, to a gun show in Mesquite. Sanders and another accomplice, Tyshon Hillary, remained at petitioner's apartment with her children. Wright told petitioner that she knew what to do. Petitioner understood that she was supposed to fill out the forms and buy the guns that they wanted. JA 181. Again at Wright's command and with money supplied by him, petitioner purchased four additional firearms that day. Wright demanded that she purchase two firearms, one for him and one for Roderick, JA 182, and further instructed her to buy two additional guns on behalf of two Hispanic males Wright had met at the show. JA 181-189. Wright, Roderick and the Hispanic males were present when the paperwork was filled out. JA 184-85. Petitioner also testified that the failed purchase was attempted at the demand of Wright. She testified that she kept trying to complete the sale because Wright threatened her. JA 189. Petitioner admitted to the jury that she made misstatements on the forms, but believed that she did not have a choice because she was afraid for herself and her kids. JA 184-86.

On cross-examination, petitioner acknowledged that she had not attempted to report the abuse to her pastor, to police, to security guards at the gun shows or to her children's teachers. Petitioner admitted that she put her girls at risk by not telling anyone about the abuse but contended that, at the time, she thought that she was protecting her girls by not revealing the abuse. JA 232-38.

The defense then called ATF Agent Kelly Oates. SF 723. The defense sought to elicit statements made to Agent Oates by Wright and Sanders, in which they admitted that the guns were purchased for them because their status as felons prevented their own purchases. The defense contended that these statements constituted admissions against interest pursuant to Fed. R. Evid. 804(b)(3) and 807. The District Court sustained the prosecution's hearsay objections on the ground that Rule 804 applied only to parties and, because Wright and Sanders were not reliable people, the statements were not trustworthy and not exculpatory to the petitioner. SF 725, 739.

The defense attempted to call Dr. Myers as a final witness. The District Court sustained the prosecution's relevance objection. The defense then rested its case under protest and both parties closed. JA 287; SF 729. After resting before the jury, the defense made proffers regarding the excluded testimony of Agent Oates, SF 731-40, and Dr. Myers, JA 273-87.

As part of petitioner's proffer, Dr. Myers' testimony was heard outside the presence of the jury. Dr. Myers testified that domestic violence is a pattern of coercive control by one party, generally a male, over another party, generally a female, where there are tactics of power and control used along with violence and sexual abuse. JA 276. She testified that the eight factors that make up a power and control relationship are: intimidation; emotional abuse; isolation; minimizing; denying and blaming; using children; male privilege; and coercion and threats. JA 277 ; Def.'s Mot. For New Trial, Tr., Doc. 107. Dr. Myers testified that, in addition to physical harm, battering damages the victim's self-esteem, causes emotional and psychological harm and causes the victim to become isolated, withdrawn or dependent. Battery also results in the victim becoming subservient to the batterer and changing her behavior so as not to anger the abuser. The abuse affects the perceptions and judgment of the victim and

may also cause the victim to engage in criminal behavior. JA 277-78.

Dr. Myers also testified that a woman stays in a battering relationship for dependency reasons, out of fear and terror and because she cannot formulate a plan about how she is going to succeed without the batterer. JA 279. Often she wants the violence to stop but the relationship to continue. *Id.*. Dr. Myers testified that it is common for the victim in a battering relationship not to seek help from the police, authorities or other persons as a result of shame, economic dependency and perceived danger. Dr. Myers testified that a common strategy to avoid being battered is compliance with the wishes of the batterer. JA 279-80. Dr. Myers testified that petitioner was a battered woman, who had been the victim of domestic violence at the hands of Ted Dixon and Wright. JA 280-81. Dr. Myers testified that the relationship the petitioner had with Ted Dixon was a power and control relationship that continued even after their divorce, and that petitioner had a similarly destructive power and control relationship with Wright. JA 281-82.

Dr. Myers analyzed the Petitioner's relationship with Wright and the events of that relationship, particularly leading up to the purchase of the firearms. Dr. Myers testified that the increase in the severity of the violence, the introduction of guns into the relationship and Wright's threats to petitioner's daughters escalated the power and control that Wright exercised over petitioner and thus adversely affected petitioner's judgment as to whether to buy guns. JA 282-83. Dr. Myers testified that petitioner's fears were well-grounded given her experiences with Wright. Dr. Myers testified that it was consistent with a power and control relationship for the batterer to have little or no regard for the well-being of the victim and therefore put the victim at risk by requiring her to do something illegal. JA 284. Dr. Myers testified that petitioner had not recklessly or negligently placed herself in the relationship with Wright and that her conduct was a

means of avoiding the harm that Wright threatened. JA 284. Dr. Myers' assessment was that petitioner had not called the police because she feared retaliation; did not talk to her family because she did not want to put them at risk; and that she had purchased the guns in order to buy time and to avoid an immediate risk of harm to herself and her children. Dr. Myers offered her opinion that petitioner bought the guns because petitioner did not perceive that she had any other choice. JA 284-87.

While the District Court excluded Dr. Myers' testimony, it consented to give the Fifth Circuit Pattern Instruction on duress.[5] The defense objected to the instruction and requested that the jury be charged that she had the burden of producing evidence to support each element of the duress defense, and that if she had produced such evidence, then the prosecution had to prove beyond a reasonable doubt the absence of duress or coercion. JA 47, 300. The District Court overruled the defense's objection to the pattern charge and refused the defense's proffered instruction. The charge to the jury thus placed both the burden of production and the burden of persuasion on the Petitioner to prove each element of her duress defense. JA 312-13. Petitioner was found guilty by the jury on all nine counts. JA 316-17.

### C. Court Of Appeals Proceedings

Petitioner's principal arguments on appeal concerned the District Court's exclusion of the testimony of Dr. Myers and Agent Oates, as well as the improper shifting of the burden of proof on the duress defense. Describing the case as "unremarkable" save for the fact that petitioner had raised "battered woman's syndrome" as part of her duress defense, the Fifth Circuit affirmed. JA 325-26.

The bulk of the Fifth Circuit's opinion addresses the exclusion of Dr. Myers' testimony and holds that the District

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[5] JA 286-87, 290-91.

Court had not abused its discretion on three grounds.[6] First, despite Dr. Myers' explications of the nature and effect of battering upon the perceptions, judgment and behavior of the victim generally, the Fifth Circuit concluded that the proffered testimony was "inherently subjective" because the testimony "clearly focused on Dr. Myers's opinions as to [petitioner's] individual state of mind. JA 328-29. In this regard the Fifth Circuit's attack on the supposed "subjectivity" of such testimony conflicts with contrary decisions by the Tenth Circuit,[7] Federal District Courts,[8] state courts[9] and a Joint report by the Department of Justice and the United States Department of Health and Human Services published in May 1996.[10]

Second, the Fifth Circuit declared that Dr. Myers's opinions were "conclusory" given that her proffered testimony addressed the reasonableness of petitioner's actions in light of her mental state. JA 329. Such a contention, even if it were accurate, plainly could have been addressed by appropriate

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[6] While the Question Presented does not include the Fifth Circuit's error in excluding Dr. Myers' testimony, that error compounded the Fifth Circuit's burden-shifting error. The erroneous exclusion of Dr. Myers' testimony made it even more likely the Petitioner could not carry an affirmative burden. This additional error is therefore relevant to any harmless error analysis the Court undertakes.

[7] *Dunn* v. *Roberts*, 963 F.2d 308 (10th Cir. 1992). The Eighth Circuit has also affirmed the prosecution's use of such evidence to counter an abuse victim's recantation of her testimony against an abusive defendant. *Arcoren* v. *United States*, 929 F.2d 1235, 1240 (8th Cir. 1991).

[8] *United States* v. *Marenghi*, 893 F. Supp. 85 (D. Me. 1995).

[9] *People v. Romero*, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), *rev'd on other grounds*, 883 P.2d 388 (1994)

[10] *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (May 1996), *available at* http://www.ncjrs.org/pdffiles/batter/pdf and at the United States Department of Justice website, www.usdoj.gov).

limitations by the District Court upon Dr. Myers's testimony. Third, the Fifth Circuit found no abuse of discretion because Dr. Myers was "not a competent witness to testify as to the facts of [petitioner's] relationship with Wright based upon what others told her." JA 331. This contention defies both Fed. R. Evid. 703 ("the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted") and the record in that Dr. Myers had interviewed petitioner.[11]

With respect to the burden-shifting argument, petitioner acknowledged that the law in the Fifth Circuit, and in a minority of other circuits, requires the proponent of the duress defense to bear the burden of production and persuasion, by a preponderance of the evidence. Petitioner pointed out that the rule in the majority of circuits is to place the burden of production on the defendant, and then, once the defendant meets that burden, to leave the burden of persuasion on the prosecution to prove that duress evidence does not create reasonable doubt. Petitioner contended that the majority rule is the better rule, pointing out the prosecution's ample opportunity to contest the facts and circumstances that she claimed were the source of the duress. Petitioner asked the Fifth Circuit to reconsider its rule based, in part, on her argument that the duress defense negated the *mens rea* element of the charge, and thus the prosecution has the constitutional burden of disproving duress beyond a reasonable doubt, citing *In re Winship*, 397 U.S. 358, 364

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[11] The Fifth Circuit's reasoning on this point is entirely circular in that it responds to petitioner's reliance upon Fed. R. Evid. 703 by observing that Dr. Myers's testimony was not admissible in any event: "Where, as here, an expert's testimony is inadmissible, the hearsay upon which that opinion is based is also inadmissible." JA 330. Yet the opinion plainly indicates in its language and structure that the supposed "incompetency" of Dr. Myers was a separate ground for affirming the rejection of her testimony.

(1970). The court of appeals simply affirmed based upon its prior holdings and without further analysis. JA 332.[12]

After the panel affirmed, petitioner timely sought Rehearing En Banc. In seeking rehearing, petitioner pointed out the substantial split of authority among the circuits, that the Fifth Circuit was in the minority and asked the en banc Fifth Circuit to reconsider its burden-shifting rule in duress cases.

## SUMMARY OF ARGUMENT

The Fifth Circuit's rule is contrary to modern common law respecting the allocation of burdens of proof in criminal cases involving so-called "affirmative defenses" such as duress. Recognized by a significant majority of federal circuit courts of appeals as well as a significant majority of both state courts and state statutes, common law dictates that once a defendant adduces sufficient evidence in support of a defense of duress or coercion, the prosecution retains the burden of disproving duress beyond a reasonable doubt. The Fifth Circuit's rule is anachronistic in that it comports with early common law traditions that treated criminal trials in the same fashion as civil disputes.

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[12] The Fifth Circuit's burden-shifting rule for duress defenses has a sparse pedigree. The earlier *Willis* opinion cited by the court of appeals in the present case offers only that "[s]ince a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant. *Gant* v. *United States*, 691 F.2d 1159, 1165 (5th Cir. 1982). To succeed, the defendant must prove every element of the defense by a preponderance of the evidence." *United States* v. *Willis*, 38 F.3d 170, 179 (5th Cir. 1994). The cited *Gant* opinion (691 F.2d at 1165), offers no support as it does not render a holding, or even discuss, the burden of persuasion. Instead, it appears that the Fifth Circuit's rule turns entirely upon a Ninth Circuit decision, *United States* v. *Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991), which it cited in a footnote to its *Willis* decision. The flaws in the *Dominguez-Mestas* opinion are discussed *supra*. Prior to *Willis*, there appears to be no other Fifth Circuit case that discusses the burden of persuasion on a duress defense.

The more recent common law holds that allocating burdens of proof in criminal trials in the same fashion as civil ones necessarily conflicts with the fundamental tenets of criminal law, including the presumption of innocence and the concordant burden of the prosecution to prove guilt beyond a reasonable doubt. This Court's opinions regarding the nature of *mens rea* also support the common law rule in that those decisions demonstrate that duress and coercion defenses necessarily address the *mens rea* component of crime. Practical considerations, including risk of juror confusion engendered by conflicting instructions, also support the majority rule.

The scant reasoning in support of the Fifth Circuit rule amounts to a claim that duress defenses can be difficult for the prosecution to disprove. The Court has rejected that claim. Moreover, it is inconsistent with the nature of the defense, which necessarily involves other individuals who are responsible for creating observable, coercive circumstances. And it is further belied by the power of trial courts to reject evidence that is not probative or reliable and to refuse an instruction on duress where the evidence of duress is insufficient to warrant one.

The error in this case was constitutional in dimension. The Court's interpretations of the requirements of the Due Process Clause in the context of the allocation of burdens state plainly that where a defense addresses an element of the crime charged, criminal courts may not instruct a jury that the defendant bears any substantive burden of proof. The Court has consistently held over the last half-century that the *mens rea* component of criminal charges encompasses the fundamental principle that the accused was free to choose a course of action other than unlawful conduct. Duress or coercion defenses, by their very terms, strike at the roots of *mens rea*. As such, the requirements of the Due Process Clause preclude shifting the substantive burden to the defense in a duress case.

The error in this case was structural and requires automatic reversal. Allocations of burden of proof affect the substantial rights of a criminal defendant in that they fundamentally affect the manner in which the fact finder assesses and weighs evidence. Thus, the error affects the framework within which the trial proceeds. Further, the prosecution is unable to show that the error at issue was harmless. Here, petitioner's duress defense was her sole defense at trial. The trial court deemed her duress evidence sufficient to warrant an instruction on the defense as a threshold matter. The evidence that petitioner adduced at trial was corroborated in certain important respects by the prosecution's own case. Taken as a whole, the evidence of duress was sufficient to create a reasonable doubt. Petitioner proffered additional evidence to bolster her defense, including the testimony of an expert on domestic violence, that the trial court erroneously excluded. The record therefore reflects that imposing upon petitioner the burden of proving her defense by a preponderance of the evidence had a substantial effect on the outcome of her trial.

## ARGUMENT

### I. COMMON LAW IN FEDERAL AND STATE COURTS, AS WELL AS THE MAJORITY OF STATE STATUTES SUPPORTS REJECTION OF THE FIFTH CIRCUIT'S BURDEN-SHIFTING RULE.

Congress has not passed a statute codifying the defense of duress.[13] Instead, the law regarding this defense has developed as federal common law. *United States* v. *Dodd*, 225 F.3d 340, 345 (3d Cir. 2000). This Court has recognized

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[13] The terms duress and coercion refer to the same defense, mean the same thing and are used interchangeably. *See Fifth Circuit Pattern Jury Instructions, Criminal*, § 1.36 (2001); *Sixth Circuit Pattern Jury Instructions*, § 6.05 (1991); *United States* v. *Dodd*, 225 F.3d 340, 349 n.6 (3d Cir. 2000); *United States* v. *Toney*, 27 F.3d 1245, 1248 (7th Cir. 1994).

the concept of duress and its applicability to federal criminal statutes. *United States* v. *Bailey*, 444 U.S. 394, 409-10 (1980). While the Court has not expressly addressed how the burdens of production and persuasion should be allocated, a substantial majority of courts, as well as state statutes, reject shifting any of the burden of persuasion to the defense to prove duress. *Dodd*, 225 F.3d at 348-49.

**A. Duress At Common Law.**

At common law, duress was available where the individual asserting the defense had acted under "an unlawful threat of imminent death or serious bodily injury." *Bailey*, 444 U.S. at 409. Blackstone described duress as "threats and menaces which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal." W. Blackstone, 4 *Commentaries* *30. Blackstone further explained that, duress is "a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject." *Id.* Thus, "it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion." *Id.* Blackstone's explanation of duress closely models the rationale for what are sometimes called excuse defenses – that the actor is not "sufficiently able to control his conduct so as to be held accountable for it." 2 Paul Robinson, *Criminal Law Defenses* 348 (1984). Where duress is present, punishment serves neither the deterrent nor the condemnatory purposes of criminal justice because a person of reasonable firmness in the same situation would also succumb to the coercion. *Id.* at 349.

Early common law courts allocated the burden of proof in criminal cases in the same manner as they did in private disputes. George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 910 (1968). Procedural

rules governing criminal liability were therefore indistinguishable from the rules governing private disputes. *Id.* at 894. Early common law courts strictly adhered to the Roman maxim that "the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule." *Id.* at 898. Thus, even though early common law courts recognized the presumption of innocence and required the prosecution to prove its case beyond a reasonable doubt, criminal defendants bore the burden of persuasion on all defenses, including duress. *Id.* at 894.[14]

Although widely accepted until the end of the Nineteenth Century, the early common law rule was the product of flawed reasoning as it was based on the authority of one case, *The King* v. *Oneby*, 92 Eng. Rep. 465 (K.B. 1727). Blackstone interpreted *Oneby* to stand for the general principle that a criminal defendant should bear the duty of persuasion on all issues that appeared to be defensive. Fletcher, *supra* at 902-03. *Oneby's Case*, however, was not a criminal jury trial where there was a general verdict. Instead, it came before the judges of the King's Bench pursuant to special verdict proceeding, whereby the judges made a decision based upon facts that had already been determined. *Id.* at 902.[15]

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[14] The leading early authorities on the common law both reflected this rule. In *Crown Law*, Foster explained that the prisoner had to "satisfactorily" prove circumstances of "accident, necessity and infirmity." M. Foster, *Crown Law* 255 (1762). Blackstone similarly stated that the defense's case included "circumstances of justification, excuse and alleviation." 4 Blackstone, *supra* at 201. Neither Foster nor Blackstone distinguished between the burdens of production and persuasion. This continued to be the rule when the Fifth Amendment was adopted and it was the American rule when the Fourteenth Amendment was ratified. *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977).

[15] Fletcher, *supra* at 902. Oneby had killed a man in a fight over a game of cards. *Id.* The facts contained in the verdict did not indicate whether Oneby had killed maliciously. The judges found Oneby guilty of

Blackstone's rule won wide acceptance in a different procedural context from its source, litigation of private disputes. The process of finding guilt or non-guilt in a criminal trial, however, is very different than merely finding facts in a special verdict case from which the judge would determine guilt or innocence. In a case on a general verdict, the process of fact-finding and of determining guilt beyond a reasonable doubt are inseparable. *Id.* at 906.

Toward the end of the Nineteenth Century, courts in common law jurisdictions began to apply anew the long-held traditional view that there must be moral content to criminal guilt. [16] Criminal guilt was equated with blameworthiness. Instead of seeing defensive claims as issues to be separately

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murder and explained that "'[i]f A kills B and no sudden quarrel appears, it is murder" adding that "it lies on the party indicated to prove the sudden quarrel.'" *Id.* (alteration in original) (quoting *Oneby*, 92 Eng. Rep. at 473). Foster and Blackstone interpreted *Oneby* to support the general principle "that a criminal defendant should bear the burden of persuasion on all issues that appear to be 'defensive.'" *Id.* at 902-03. English Courts applied the rule announced by Foster and Blackstone to cases involving self-defense and insanity for many years but reconsidered the rule in 1935 in *Woolmington* v. *Director of Public Prosecutions*, [1935] A/C/ 462. *Id.* at 903 and nn.74-75. In *Woolmington*, the English Court rejected the applicability of Blackstone's rule to the defense of accident in a homicide case. English Courts later expanded the *Woolmington* rule to include provocation and self-defense. However, Foster and Blackstone's interpretation of *Oneby* was criticized much earlier in a dissent to the landmark decision *Commonwealth* v. *York*, 50 Mass. 93 (1845). The dissent explained that the *Oneby* rule was dicta and noted that Blackstone had relied entirely on Foster. *Id.* at 132-33 (Wilde, J. dissenting). Later treatises simply cited either Blackstone or Foster in support of the rule. *Id.* at 133. Justice Wilde considered that the rule placing the burden of persuasion on the criminal defendant had little basis in law or fact and thus was misapplied. *Id.* at 134.

[16] *See Trumble* v. *Territory*, 21 P. 1081 (Wyo. 1889); *State* v. *McCluer*, 5 Nev. 132 (1869); *Territory* v. *Lucero*, 46 P. 18 (N.M. 1896); *State* v. *Porter*, 34 Iowa 131 (1871); *State* v. *Hill*, 69 Mo. 451 (1879); *People* v. *Marshall*, 44 P. 718 (Cal. 1896); *People* v. *Coughlin*, 32 N.W. 905 (Mich. 1887); Fletcher, *supra* at 912.

determined, exculpatory issues became "threads in the fabric of guilt," no different than inculpatory matters such as the proof of the act or conduct. Fletcher, *supra* at 912. In viewing inculpatory and exculpatory issues as part of the whole, common law courts held that it no longer made sense to divide the burden of persuasion among the issues. Proceeding from the premise that the prosecution had to prove the defendant's guilt, courts in the United States moved to the position that the prosecution had to disprove properly raised claims of self-defense and insanity. The most notable, and influential decision holding that the prosecution bears the burden to disprove a properly raised defense beyond a reasonable doubt, was this Court's decision in *Davis* v. *United States*, 160 U.S. 469 (1895).

### B. The Evolution Of The Common Law With Respect To Affirmative Defenses In United States Courts.

In *Davis*, the issue was whether a defendant asserting a defense of insanity had the burden of persuasion on that issue or whether, once the issue was raised, the prosecution had to disprove the defense. Following an examination of the history of the insanity defense and the leading decisions of the time, the Court concluded that once the accused had produced evidence of insanity, the prosecution must then prove that the defense did not create a reasonable doubt, given that the defense addressed the *mens rea* element of the crime charged. *Id.* at 485 ("One who takes human life cannot be said to be actuated by malice aforethought . . . unless at the time he had sufficient mind"). In reaching its decision, the Court relied on the most fundamental concept of criminal law, "that 'to make a complete crime cognizable by human laws, there must be both a will and an act'...So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act, consequent upon such vicious will.'" *Id.* at 484 (quoting W. Blackstone, 4 *Commentaries* *21).

The Court observed that a criminal proceeding is fundamentally different than a civil one in that a not guilty plea "controverts the existence of every fact essential to constitute the crime charged." *Id.* at 485. Moreover, because the presumption of innocence is "an instrument of proof . . . whereby [the accused's] innocence is established . . . the burden of proof, as those words are understood in the criminal law, is never upon the accused to establish his innocence." *Id.* at 487. Guilt therefore cannot be "regarded as proved if the jury entertain a reasonable doubt from *all the evidence* whether he was legally capable of committing a crime." *Id.* at 486 (emphasis added).

Thus, the *Davis* Court rejected the common law method of equating civil and criminal matters for purposes of the burden of proof. It employed and reaffirmed the requirement that the prosecution bears the sole burden to persuade fact finders that there was both an "evil mind" and an "evil act" before one can be found guilty of a crime. The Court emphasized that the prosecution's irreducible burden was to demonstrate that none of the evidence admitted in the case rose to the level of a reasonable doubt. If "the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged." *Id.* at 488.

While the Court has not construed *Davis* as a constitutional ruling,[17] it had a seminal impact on the federal common law. Accordingly, subsequent courts applied the holdings in *Davis*

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[17] Subsequent decisions have treated *Davis* as a case involving this Court's supervisory power. *See Leland* v. *Oregon*, 343 U.S. 790, 797 (1952) ("The [*Davis*] decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts."); *see also Mullaney* v. *Wilbur*, 421 U.S. 684, 696 (1975) (*Davis* "decid[ed] a question of federal criminal procedure"); *Patterson*, 432 U.S. at 203 ("*Davis* was not a constitutional ruling").

to defenses other than insanity, including self-defense,[18] lack of knowledge,[19] and entrapment,[20] as well as duress.[21] While

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[18] *De Groot* v. *United States*, 78 F.2d 244 (9th Cir. 1935) (a defendant has the initial burden of producing evidence of self-defense and then the government has the burden of persuasion to show beyond a reasonable doubt that the defendant did not act in self-defense); *Meadows* v. *United States*, 82 F.2d 881, 884 (D.C. Cir. 1936) (approving jury instruction that no burden is placed upon the defendant to prove self-defense); *Kelly* v. *United States*, 361 F.2d 61, 62 (D.C. Cir. 1966) (defendant has the burden of production of evidence to raise self-defense, and then the government must disprove self-defense beyond a reasonable doubt); *Bynum* v. *United States*, 408 F.2d 1207 (D.C. Cir. 1968) (same); *United States* v. *Alvarez*, 755 F.2d 830, 842 (11th Cir. 1985) (it has become "a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government") (citing *United States* v. *Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir. 1978), *United States* v. *Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977), *Frank* v. *United States*, 42 F.2d 623, 629 (9th Cir. 1930), and *Davis*, 160 U.S. at 488). *See also*, *United States* v. *Deon*, 656 F.2d 354, 355 (8th Cir. 1981) (acknowledging that the prosecution has the burden of disproving self-defense beyond a reasonable doubt, once the defense has been raised). For decades, this has also been the rule on self-defense in the Fifth Circuit. *United States* v. *Johnson*, 542 F.2d 230, 233 n.4 (5th Cir. 1976).

[19] *Cf. Bryson* v. *United States*, 396 U.S. 64, 69 (1969) (conviction for making a false statement under 18 U.S.C. § 1001 negates any claim that the defendant "did not know the falsity of his statement at the time it was made, or that it was the product of an accident, honest inadvertence, or duress"); *United States* v. *Steinhilber*, 484 F.2d 386, 390 (8th Cir. 1973) (relying upon *Bryson* in holding that prosecution has the burden of negating the defendant's claim that he did know the nature of the falsity of his statement, or that it was the product of an accident, honest inadvertence or duress).

[20] When a defendant has produced evidence that he has been entrapped, the prosecution must prove beyond a reasonable doubt that the accused was predisposed to commit the offense independent of the government's acts. *Jacobson* v. *United States*, 503 U.S. 540, 554 (1992). This was the prevailing view before *Jacobson* was decided. *United States* v. *Humphrey*, 670 F.2d 153, 155-56 (11th Cir. 1982); *United States* v. *Dean*,

the ultimate holding of *Davis* has been superseded by an act of Congress placing the burden of proof on the defendant to prove insanity by clear and convincing evidence,[22] this Court's adherence to the fundamental principles announced in *Davis* has not changed – nor should it.

The *Davis* Court's construction of the *mens rea* element of crime has been reaffirmed and expanded by subsequent decisions. In *Morissette*, this court explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as a child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrenee and reformation in the place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

*Morissette* v. *United States*, 342 U.S. 246, 250-51 (1952). This court has continued to recognize the requirement of a "vicious will" as a fundamental underpinning of our criminal justice system. "Criminal liability is normally based upon the

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666 F.2d 174, 180 (5th Cir. 1982); *United States* v. *Hermosillo-Nanez*, 545 F.2d 1230, 1232 (9th Cir. 1976).

[21] See Argument II, *infra*.

[22] The Insanity Defense Reform Act of 1984 changed the common law rule established in *Davis*. It provides that "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." 18 U.S.C. § 17(b).

concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand'" *Bailey*, 444 U.S. at 402 (quoting *Morissette*, 342 U.S. at 251). This Court has continued to recognize that in determining whether there should be criminal liability, a court "must examine both the mental element, or *mens rea*, required for conviction ... and the circumstances under which the 'evil-doing hand' can avoid liability under that [statute] because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Id.*

### C. The Majority Of State And Federal Courts Now Place The Burden Of Persuasion On The Prosecution.

Courts often refer to duress as an "affirmative defense,"[23] although such categorization means little. Affirmative defenses are divided into three types. See *United States* v. *Hartsock*, 347 F.3d 1 (1st Cir. 2003). The first type encompasses defenses that negate guilt by refuting a required element of the offense. The second category includes defenses that do not negate an element of the crime, but provide a justification sufficient to overcome or mitigate criminal culpability. The third category contains defenses based on individual exceptions to substantive crimes.[24] However, identification of a defense as one of these types does not control the allocation of the burden of persuasion. "The term 'affirmative defense' sometimes is used to indicate that the defendant bears the burden of production and sometimes to indicate that the defendant bears both the

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[23] *Bailey*, 444 U.S. at 413; *United States* v. *Falcon*, 766 F.2d 1469, 1477 (10th Cir. 1985); *United States* v. *Deleveaux*, 205 F.3d 1292, 1298-99 (11th Cir. 2000); *Willis*, 38 F.3d at 179; Model Penal Code § 2.09 (Final Draft 1962); 1 LaFave, *Substantive Criminal Law* § 1.8(c) (2d ed. 2003).

[24] This third type is generally an exception or proviso in a statute setting forth the defense. *Hartsock*, 347 F.3d at 8; 1 LaFave, *supra*, § 1.8(c).

burden of production and the burden of persuasion." 1 Robinson, *supra*, § 3(c), at 16.[25]

### 1. The Majority Rule In The Federal Courts Is To Place The Burden Of Persuasion On The Prosecution.

The majority of Circuits that have addressed the issue have placed the burden of production for the duress defense on the defendant, but leave in place the prosecution's burden of persuasion. As demonstrated in the opinions of the Circuits that so hold, the reasons for placing the burden on the prosecution are substantial.

As reflected in the Model Penal Code, initially published in 1962,[26] it was well established in federal law that the

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[25] The Fifth Circuit has used broad language in stating that the assertion of an affirmative defense means that the defendant has both the burden of production and the burden of persuasion, *Willis*, 38 F.3d at 179, although that is not true of self-defense in the Fifth Circuit. *E.g.*, *Johnson*, 542 F.2d at 233 n.4. Other circuits acknowledge that the label of affirmative defense has little to do with who has the burden of persuasion and that the burden of proof for an affirmative defense is generally determined on a case by case basis. *See United States* v. *Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996); *Alvarez*, 755 F.2d at 842 n.12 (explaining that for affirmative defenses, the burden of persuasion may fall either on the government or the defendant, as determined by statute or by case decision). This approach has been criticized because of a lack of a consensus on criteria for allocating the burden. 1 LaFave, *supra*, § 1.8(c); 1 Robinson, *supra* § 5(b)(2).

[26] The Model Penal Code (Final Draft 1962) provides that "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." *Id.* § 2.09(1). The defense is unavailable if the actor negligently places himself in a situation in which it was probable he would be subject to duress. *Id.* § 2.09(2). Recognition of the defense of duress reflects the long tradition of penal laws that a person will not be held criminally responsible for his conduct when he is overwhelmed by such force that his behavior is considered involuntary. *Id.* § 2.09, comt. 2. In such instance

prosecution had the burden of disproving a defense that involved a defendant's blameworthiness. As the Eighth Circuit explained, "[i]t is the law, and no one contends otherwise, that the burden of proof rests upon the Government to prove the defendant's guilt beyond a reasonable doubt and there is no burden upon the defendant to prove his defense of coercion." *Johnson* v. *United States*, 291 F.2d 150, 155 (8th Cir. 1961). Fourteen years later when the Ninth Circuit addressed the issue in *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), there similarly seemed to be no question that once the defendant offered evidence to support a defense of duress, the prosecution had to disprove duress beyond a reasonable doubt. *Id.* at 1336 & n.2. The court in *Hearst* adopted the reasoning of *Davis*, without citation, in holding

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the actor's conduct is considered to be justified or excused. *Id.* § 1.12, cmt. 3. The Model Penal Code provides a broader defense than 5th Circuit law, which only allows the defense when there is a threat of serious bodily injury or death. *Fifth Circuit Pattern Jury Instructions, Criminal* § 1.36 (2001).

Section 1.12 sets forth the general requirement that the prosecution must prove each element of an offense beyond a reasonable doubt in order to warrant a conviction. The term "element of an offense" is broadly defined to include negating an excuse or justification for such conduct. Model Penal Code § 1.13(9); § 1.12, cmt. 2. However, the requirement of negating an affirmative defense arises only after there is evidence produced, by the defense or prosecution, sufficient to raise a reasonable doubt on the issue. Thereafter, the prosecution must disprove the defense beyond a reasonable doubt. *Id.* § 1.12, cmt. 3. These provisions result from a belief that a determination of guilt requires proof beyond a reasonable doubt of the prohibited act as well as the requisite criminal intent, or *mens rea*. *Id.* § 1.12, cmt. 5.

that the prosecution bears the burden to disprove coercion.[27] *Hearst*, 563 F.2d at 1336.[28]

Both the Eighth[29] and Sixth[30] Circuits followed the Ninth Circuit's decision in *Hearst* when they decided the same question. The Second Circuit addressed the issue in response to a claim that the Due Process Clause requires the prosecution to disprove duress beyond a reasonable doubt. Although discussing constitutional considerations, the Second Circuit did not rely on the Due Process Clause in deciding the issue. Instead, the court explained that:

> Several considerations lead us to conclude that in federal criminal trials, the [prosecution's] burden of disproving

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[27] In so holding, the Ninth Circuit relied on its own insanity defense cases, *Hartford* v. *United States*, 362 F.2d 63, 64 (9th Cir. 1966) (citing *Buatte* v. *United States*, 330 F.2d 342, 345 (9th Cir. 1964)), which in turn relied on this Court's opinion in *Davis*.

[28] The Ninth Circuit reaffirmed the holding in *Hearst* in subsequent cases: *United States* v. *Gonsalves*, 675 F.2d 1050 (9th Cir. 1982), which held that after a defendant shifts the burden to the prosecution by raising an affirmative defense, the government is required to disprove every element of the affirmative defense beyond a reasonable doubt. In *United States* v. *Guess*, 629 F.2d 573, 577 (9th Cir. 1980), the court cited *Davis* and *Hearst* in support of its holding that once a criminal defendant satisfies his burden of producing evidence to support an affirmative defense, the prosecution must then disprove the defense beyond a reasonable doubt.

[29] *United States* v. *Campbell*, 609 F.2d 922, 925 (8th Cir. 1979). *See also Model Criminal Jury Instructions for the Eighth Circuit* § 9.02 (rev. ed. Sept. 1986) (the negative of any submissible defense should be added as an element of the offense); *United States* v. *Norton*, 846 F.2d 521, 524-25 (8th Cir. 1988) ("when the coercion defense is an issue, a final element regarding that matter, phrased in the negative, should be added to the general elements instruction" (internal quotation omitted)).

[30] *United States* v. *Campbell*, 675 F.2d 815, 821 (6th Cir. 1982). *See also Pattern Criminal Jury Instructions* § 6.05 (1991) (Coercion or Duress) (the instruction on coercion or duress provides that the prosecution has the burden of proving that the defendant was not coerced).

> at least one element of duress should be prove[d] beyond a reasonable doubt. There is a grave possibility of juror confusion if a jury is instructed, on the one hand, that the prosecution must prove all elements of the crime, including willfulness, beyond a reasonable doubt, and, on the other hand, that the prosecution need only to disprove duress by a preponderance of the evidence. Such instructions can create an unacceptable risk that the jury will accept a preponderance of the evidence as sufficient to satisfy the prosecution's burden of proving willfulness beyond a reasonable doubt. Moreover, a reasonable doubt standard for duress will lessen the risk that a jury will convict solely because of failure of a defense, a consideration we have previously stressed in formulating federal rules of practice for jury instructions....We are not persuaded that juror confusion may be avoided simply by adding an admonition that, regardless of whether the jury disbelieves the duress evidence, the burden remains on the government to establish every element of the crime beyond a reasonable doubt.

*United States* v. *Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983).[31] The Tenth[32] and First[33] Circuits reached the same conclusion.

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[31] The Second Circuit added that it saw no reason peculiar to the duress defense that would warrant departure from the general federal practice. *See Mitchell*, 725 F.2d at 836 (citing the Eighth Circuit's *Campbell* opinion, 609 F.2d at 925, *Hearst*, 563 F.2d at 1336 n.2, Model Penal Code §§ 1.13, 2.09, and 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 14.16 (3d ed. 1977)). The Second Circuit's holding in *Mitchell* has been reaffirmed in *United States* v. *Smith*, 160 F.3d 117, 123 (2d Cir. 1998) (citing 1 LaFave & Scott, *Substantive Criminal Law* § 1.8, at 75 (1986)).

[32] "Coercion is an affirmative defense which the government must disprove beyond a reasonable doubt only after the issue has been raised." *Falcon*, 766 F.2d at 1477 (citing *Bailey*, 444 U.S. at 412-13, *United States* v. *Corrigan*, 548 F.2d 879, 881-82 (10th Cir. 1977), and *United States* v. *Jackson*, 569 F.2d 1003, 1009 & n.14 (7th Cir. 1978)). The latter two are

Even prior to the Seventh Circuit's first opportunity to address the issue, the *Federal Criminal Jury Instructions of the Seventh Circuit* placed the burden on the prosecution to prove beyond a reasonable doubt the absence of coercion.[34] Of particular note is the Seventh Circuit's second opinion on the burden of persuasion, *United States* v. *Talbott*, 78 F.3d 1183 (7th Cir. 1996), where the defendant was charged with

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self-defense cases which hold that once the defendant raises the issue of self-defense, the prosecution must disprove that defense beyond a reasonable doubt. This holding was reaffirmed by the Tenth Circuit in *United States* v. *Scott*, 901 F.2d 871, 873 (10th Cir. 1990).

[33] In *United States* v. *Amparo*, 961 F.2d 288, 291 (1st Cir. 1992), the court held that once a defendant has satisfied an "entry level burden" to support a finding of duress, "and the crime charged requires *mens rea*, the government must prove beyond a reasonable doubt that the defendant's criminal acts were not in fact the product of duress." The First Circuit has not wavered from its decision in *Amparo*. In *United States* v. *Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996), the court held that in a case charging possession of a controlled substance with the intent to distribute, a defendant must produce sufficient evidence that "fairly supports" each element of his duress defense, and that a district court is not to weigh the evidence, make credibility determinations or resolve any conflicts of proof in determining whether the accused has borne the burden of production. Thereafter, the prosecution is required to show beyond a reasonable doubt that the defendant's acts were not the product of duress. *Id. See also First Circuit Pattern Criminal Jury Instructions* §§ 5.04, 5.05 (1998) (the prosecution has the burden of disproving the defenses of self-defense and duress once they have been properly raised).

[34] The pattern instructions provide that the jury should be instructed on the issue by adding coercion-negation as an element that must be proved beyond a reasonable doubt, citing *Johnson* v. *United States*, 291 F.2d 150 (8th Cir. 1961). *Federal Criminal Jury Instructions of the Seventh Circuit* § 4.05, cmt. (1980). In *United States* v. *Toney*, 27 F.3d at 1248, the court held that once a defendant meets the initial burden of producing some evidence of each element of the defense of coercion, "he is entitled not only to an instruction on coercion, but also a so-called 'coercion-negation' instruction." The court reasoned that once the defendant sufficiently raises the issue of coercion, he is "*presumed* coerced, therefore presumed innocent, unless the government disproves coercion beyond a reasonable doubt." *Id.*

being a felon in possession of a firearm and in possession of ammunition in violation of 18 U.S.C. § 922(g)(1), to which he raised a self-defense and a "good faith" defense. The trial judge found that both defenses were sufficiently raised, but instructed the jury that the defendant bore the burden of proving the defense by a preponderance of the evidence. On appeal, the Seventh Circuit recognized that this Court's Due Process Clause jurisprudence allows a legislature to place the burden on the defendant to prove an affirmative defense, citing *Patterson* v. *New York*, 432 U.S. 197 (1977) and *Martin* v. *Ohio*, 480 U.S. 228 (1987). The Seventh Circuit rendered a decision based on federal common law. The court expressly stated that its analysis also applied to the defenses of duress, coercion, necessity or self-defense. *Talbott*, 78 F.3d at 1187 n.2.[35]

As demonstrated by the Circuit Court decisions above, there is ample justification for requiring the prosecution to disprove duress beyond a reasonable doubt once the defendant has put forth evidence in support of the defense. The most fundamental reason is that our criminal courts do not permit the prosecution to take the liberty of a citizen unless that citizen is morally blameworthy for her actions. In recognizing the defense of duress, our society has accepted that a person does not act with the requisite "evil mind" if he or she acts under the sway of the will of another.[36] Accordingly, a duress defense controverts the essential *mens rea* component of the prosecution's burden and the

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[35] In further support of its ruling, the court cited the Federal Judicial Center's federal pattern instruction that places the burden on the government to disprove duress beyond a reasonable doubt. *Talbott*, 78 F.3d at 1187; *Pattern Criminal Jury Instructions*, Instruction 56 (1987).

[36] "Society has always recognized that even individuals who would otherwise obey the law can be forced to commit an offense if threatened with a sufficiently grave harm." 2 Robinson, *supra* § 177(a), at 349. Accordingly, we say his or her conduct is excused or justified. *Id.* § 177(b); *Model Penal Code*, §§ 2.09, 3.02.

prosecution must bear the burden of persuasion to disprove the duress defense. To hold otherwise would allow the prosecution to obtain a conviction even when the jury concludes that the defense raises a reasonable doubt about the defendant's guilt. Even if this Court holds that the Fifth Circuit's rule does not violate the Due Process Clause, the reasoning of the common law courts remains persuasive.

The legitimacy of criminal convictions turns upon the prosecution's duty to rebut an accused's presumed innocence by demonstrating beyond a reasonable doubt that the accused both committed the act *and* is responsible for her actions. See *In re Winship*, 397 U.S. at 363-64 (it is "indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

Practical considerations also support the common law rule. Differing instructions create an unacceptable risk that a jury will be confused and thereby apply the wrong burden of proof when determining guilt. *Mitchell*, 725 F.2d at 836. Risk of even greater confusion exists in trials involving multiple charges and a duress defense negates an element of one charge, and is raised as to another charge where duress is not considered to negate an element.[37] In that case a jury would be asked to apply different standards of proof with respect to the duress defense in determining guilt on the various charges, even though the factual basis of the defense may remain the same and the charges arise out of the same conduct. In addition, having a reasonable doubt standard for a duress defense will lessen the risk that a jury will convict solely because of the failure of defense evidence, irrespective of the strength of the prosecution's case on the charged

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[37] *Compare Ninth Circuit Pattern Jury Instructions, Criminal*, § 6.5 (2003) (To Refute Element of Offense), *with id.* § 6.6 (Legal Excuse).

offense. See *United States* v. *Burse*, 531 F.2d 1151, 1153 (2d Cir. 1976) (reversible error in federal prosecution to refuse defendant's request for a jury instruction that, even if alibi witnesses are disbelieved, burden of proof remains with the government).

### 2. State Courts Overwhelmingly Place The Burden Of Persuasion For The Duress Defense On The Prosecution.

Although states vary in their allocation of the burden of proof when defendants assert a duress defense, the vast majority of state courts have chosen not to shift the burden of proof. Twenty-nine states have made the reasoned judgment that the prosecution should retain the ultimate burden of proof.[38] Each jurisdiction, pursuant to a variety of standards,

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[38] *Haywood* v. *State*, 190 So. 2d 725 (Ala. Ct. App. 1966); *Bailey* v. *People*, 630 P.2d 1062 (Colo. 1981); *State* v. *Rouleau*, 528 A.2d 343, 345 (Conn. 1987); *Smith* v. *State*, 826 So. 2d 1098 (Fla. Dist. Ct. App. 2002); *Wright* v. *State*, 442 So. 2d 1058 (Fla. Dist. Ct. App. 1983); *Aleman* v. *State*, 489 S.E.2d 867, 869 (Ga. Ct. App. 1997); *State* v. *Canelo*, 924 P.2d 1230, 1235-36 (Idaho Ct. App. 1996); *People* v. *Pegram*, 504 N.E.2d 958 (Ill. App. Ct. 1987); *Wolfe* v. *State*, 426 N.E.2d 647 (Ind. Ct. App. 1981); *State* v. *Hibdon*, 505 N.W.2d 502 (Iowa Ct. App. 1993); *State* v. *Hunter*, 740 P.2d 559 (Kan. 1987); Ky. Rev. Stat. Ann. §§ 501.090, 500.070; *State* v. *Glidden*, 487 A.2d 642 (Me. 1985); *Herd* v. *State*, 724 A.2d 693 (Md. Ct. Spec. App. 1999); *Commonwealth* v. *Robinson*, 415 N.E.2d 805 (Mass. 1981); *People* v. *Terry*, 569 N.W.2d 641 (Mich. Ct. App. 1997); *State* v. *Charlton*, 338 N.W.2d 26, 30-31 (Minn. 1983); *West* v. *State*, 725 So. 2d 872, 887-88 (Miss. 1998), *abrogated on other grounds by Jackson* v. *State*, 860 So. 2d 653 (Miss. 2003); *State* v. *Romano*, 809 A.2d 158 (N.J. Super. Ct. App. Div. 2002); *State* v. *Castrillo*, 819 P.2d 1324 (N.M. 1991); N.M. R. Cr. UJI § 14-5130; Okla. Stat. tit. 21, § 156 (1992); *Spunaugle* v. *State*, 946 P.2d 246 (Okla. Crim. App. 1997); *State* v. *Boldt*, 841 P.2d 1196, 1197 (Or. Ct. App. 1992) (citing *State* v. *Matthews*, 569 P.2d 662, 663 (Or. Ct. App. 1977)); *Commonwealth* v. *Barnes*, 162 A. 670, 678 (Pa. Super. Ct. 1932); *State* v. *Verrecchia*, 766 A.2d 377 (R.I. 2001); *State* v. *Rome*, 452 N.W.2d 790 (S.D. 1990); *State* v. *Culp*, 900 S.W.2d 707 (Tenn. Crim. App. 1994); *State* v. *Starks*, 627 P.2d 88, 92 (Utah 1981); *Moes* v. *State*, 284 N.W.2d 66 (Wis. 1979); In three states,

does impose a burden of production upon defendants to place the defense at issue in the case. The prosecution is then obligated to disprove the defense and bear the risk of non-persuasion. The majority view among the states hews to the principle that criminal trials serve as a test of the state's proof of guilt beyond a reasonable doubt.

Fourteen states impose upon the defendant the burden to establish a defense of duress or coercion by the traditional civil standard of preponderance of the evidence.[39] In general, these states have created a two-step process for fact finders. First, a fact finder must determine if the state has proven the defendant's guilt beyond a reasonable doubt. Second, the fact finder has to decide if the defendant has established by a preponderance of the evidence that his or her guilt should be excused (*i.e.*, their conduct is justified) because of duress. Prior to this Court's decisions in *Mullaney* v. *Wilbur*, 421

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the defendant's burden is simply to establish a reasonable doubt that the charged conduct was the result of a free will. *People* v. *Graham*, 129 Cal. Rptr. 31 (Cal. Ct. App. 1976); *Graham* v. *Commonwealth*, 525 S.E.2d 567 (Va. Ct. App. 2000); *State* v. *Tanner*, 301 S.E.2d 160 (W. Va. 1982).

[39] *See* 1 LaFave, *supra*, § 1.8(c) n.64 (lists Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Maine, Missouri, New Hampshire, New York, North Dakota, Oregon, Tennessee and Texas as burden-shifting states for affirmative defenses); *see also*, Alaska Stat. §§ 11.81.440, 11.81.900(b) (statutorily defining affirmative defenses to mean that the defendant has the burden of establishing the defense by a preponderance of the evidence); Ark. Code Ann. §§ 5-2-208, 5-1-111(d) (requiring the defendant to prove an "affirmative defense" by a preponderance of the evidence); Del. Code Ann. tit. 11, §§ 431, 304; Haw. Rev. Stat. §§ 702-231, 701-115(2)(b); La. Rev. Stat. Ann. § 14:18(6); Mo. Rev. Stat. §§ 562.071, 556.056; *Roberts* v. *State*, 195 N.W. 114, 115 (Neb. 1923) (holding that where a defendant "interposes a plea of duress, the burden is not on the state to disprove such plea, but is on the defendant to maintain his plea by a preponderance of the evidence"); N.Y. Penal Law §§ 40.00, 25.00(2); N.D. Cent. Code §§ 12.1-05-10, 12.1-01-03(3); Ohio Rev. Code Ann. §§ 2905.01, 2905.05; *Takacs* v. *Engle*, 768 F.2d 122 (6th Cir. 1985); Tex. Penal Code Ann. §§ 8.05, 2.04; *State* v. *Riker*, 869 P.2d 43 (Wash. 1994); and Wash. Rev. Code § 9A.16.060.

U.S. 684 (1975); *Patterson* v. *New York*, 432 U.S. 197 (1977), seven states shifted the burden of persuasion to the defendant.[40] Currently, only an additional seven states have followed suit. The fourteen states include Alaska, Arkansas, Delaware, Hawaii, Louisiana, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Texas, and Washington.[41] The last state to impose a substantive burden on the defendant was Arizona, in 1997. It did so by statute..[42] In approving the shift of burden from the state to the defendant, Arizona imprecisely treated all affirmative defenses the same (*e.g.*, insanity, self-defense, entrapment) and thereby avoided reaching a determination as to whether the duress defense in Arizona negates an element of the crime or excuses otherwise criminal conduct. *State* v. *Jeffrey*, 50 P.3d 861, 863 (Ariz. Ct. App. 2003). In sum, states have chosen at a rate of 2:1 that juries should be instructed that the state bears the burden to disprove duress after a defendant satisfies its burden of production.

### 3. In Recent Years A Small Number Of Circuit Courts Have Unjustifiably Placed The Burden Of Persuasion On The Defendant.

Even though this Court has more than once recognized that the unmistakable trend in American Jurisprudence has been to place the burden of persuasion on the prosecution to disprove

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[40] *See* J. Jeffries, Jr. & P. Stephan, III, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 Yale L.J. 1325, 1399 (1979) (appendix listing Alaska, Arkansas, Delaware, Georgia, Missouri, New York and Texas as burden-shifting states).

[41] *See supra*, note 47.

[42] *See* Ariz. Rev. Stat. § 13-205 (1997) (compelling a defendant to prove any affirmative defense raised by a preponderance of the evidence, including any justification defense such as duress). Prior to the enactment of section 13-205, Arizona did not shift the burden; once the duress defense had been raised, the state bore the burden to prove the defendant's conduct was not a result of duress. *See State* v. *Barrios*, 781 P.2d 624 (Ariz. 1989).

an affirmative defense beyond a reasonable doubt, *Patterson*, 432 U.S. at 208 (citing W. LaFave & A. Scott, *Criminal Law*, § 8, at 50 (1972) and C. McCormick, *Evidence*, § 341, at 800-02 (2d ed. 1972)); *Martin*, 480 U.S. at 232; even though all of the federal courts of appeals to address the issue had placed the burden of persuasion on the government to disprove duress; and even though the law in the Ninth Circuit apparently had been well-settled since *Hearst* was decided in 1977, the Ninth Circuit reversed course. This change was the sole basis upon which the Fifth Circuit based its opinion.

In 1991, the Ninth Circuit decided *United States* v. *Dominguez-Mestas*, 929 F.2d 1379 (9th Cir. 1991). In *Dominguez-Mestas*, the defendant was indicted for importing heroin into the United States, possession of heroin with the intent to distribute and making false statements. The defendant asserted that he was under duress when he committed the offenses and sought to have the jury charged that the prosecution must prove the non-existence of duress beyond a reasonable doubt. On appeal, the defendant argued that contrary to well-established Ninth Circuit precedent, the district court required him to prove duress by a preponderance of the evidence. The Ninth Circuit decided that *Hearst*, and its progeny, *Gonsalves* and *Guess*, were really only dicta and did not establish a rule of practice in that circuit. *Id.* at 1383. The court concluded that because "duress does not involve refutation of any of the elements of the offense we conclude that it is proper to place the burden of proving that defense by a preponderance of the evidence on the defendant." *Id.* at 1384. The only rationale offered by the Ninth Circuit panel was that to "require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy." *Id.*[43]

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[43] The Ninth Circuit has continued to follow the decision in *Dominguez-Mestas*. *United States* v. *Fei Lin*, 139 F.3d 1303, 1307 (9th Cir. 1998); *United States* v. *Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999).

The Fifth Circuit did not adopt a rule regarding the burden of persuasion on a duress defense until its decision in *United States* v. *Willis*, 38 F.3d 170 (5th Cir. 1994). The Fifth Circuit's entire holding in *Willis* on the burden of proof issue is as follows:

> Since a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant. *Gant*, 691 F.2d at 1165. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence.

*Id.* at 179. A footnote to the above quotation cited the Ninth Circuit's opinion in *Dominguez-Mestas*. The Fifth Circuit's citation to *Gant* is wholly inapposite as that case did not address the burden of proof.[44] Accordingly, the Fifth Circuit engaged in little or no analysis in deciding to adopt its rule and failed to even acknowledge that other circuits had reached a different conclusion.

In 2000, the Eleventh Circuit addressed the issue for the first time in *United States* v. *Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In *Deleveaux*, the defendant was charged with unlawfully possessing a firearm because he was a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Deleveaux* contended that he was justified in briefly possessing the firearm because his family and his home were under attack by an assailant with a gun.[45] The Eleventh Circuit held that

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[44] While *Gant* does set out the elements of a necessity or duress defense, nowhere does it hold, or even discuss, where the burden of proof for such a defense should lie. *Gant*, 691 F.2d at 1165.

[45] Although the court considered the felon in possession of a firearm statute to be a "strict liability" offense, it held that the defense of justification may be available to such a charge. *Deleveaux*, 205 F.3d at 1297. The Court also concluded that justification does not negate any element of the statute, but serves only as the legal excuse for the criminal act because the defense is based upon additional facts and circumstances that are distinct from the conduct constituting the underlying offense.

because "justification is an affirmative defense, the district court properly required *Deleveaux* to prove justification by a preponderance of the evidence." *Deleveaux*, 205 F.3d at 1299. The Eleventh Circuit expressly relied on *Willis* and *Dominguez-Mestas* and specifically declined to follow the Seventh Circuit's decision in *Talbott*, 78 F.3d at 1186, which involved the same charges.[46] Ultimately, the *Deleveaux* court reasoned that the defense will usually be best situated to produce evidence relating to each element of an affirmative defense and such evidence would often "be difficult, if not impossible for the government to obtain. Under these circumstances, requiring the government to disprove justification beyond a reasonable doubt would place an unrealistic burden on the government, which fairness to the defendant does not require." 205 F.3d at 1300. In reaching its decision, the Eleventh Circuit neither considered nor acknowledged its previous rulings that for certain affirmative defenses, the accused has the burden of producing evidence to support the defense and then the prosecution has the burden of disproving the defense beyond a reasonable doubt.[47]

Following the Eleventh Circuit's ruling, the Third Circuit resolved the same question and relied upon the reasoning of

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[46] The Eleventh Circuit disagreed with the Seventh Circuit's reasoning that an express statutory allocation of the burden of proof is required to shift to the defendant the burden to prove an affirmative defense. The Eleventh Circuit believed that implicit in the Seven Circuit's reasoning was the assumption that all affirmative defenses negate an element of the offense charged. 205 F.3d at 1299-1300.

[47] *See Alvarez*, 755 F.2d at 842 n.12 (holding that in a federal prosecution, once the defendant has met the burden of production of facts in support of self-defense, the government has the burden of persuasion to negate self-defense beyond a reasonable doubt); *United States* v. *Kloess*, 251 F.3d 941, 948 (11th Cir. 2001) (in an obstruction of justice prosecution where the statute provides for a defense, the defendant has the burden of going forward with sufficient evidence to raise the defense, but the ultimate burden of persuasion remains with the prosecution to disprove the defense beyond a reasonable doubt).

the Eleventh Circuit, but issued a more limited ruling that distinguished but did not alter the common law respecting duress or coercion defenses.[48]

Only the Fifth, Ninth and Eleventh Circuits have held that the defendant bears the burden of persuasion to prove a duress defense. All three rely upon a flawed rationale supporting a burden-shifting rule; namely, that the defendant will usually be best situated to produce evidence of duress so that there is a "manifest disparity in convenience of proof and opportunity for knowledge" which would make it nearly impossible for the prosecution to disprove duress beyond a reasonable doubt.

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[48] *United States* v. *Dodd*, 225 F.3d 340 (3rd Cir. 2000), also involved a justification defense (the defendant picked up a gun left on the street in order to keep it out of the hands of nearby children) to a felon in possession charge under 18 U.S.C. § 922(g)(1). The Third Circuit found this to be a question of federal common law for which there was no binding precedent in the Third Circuit or from the Supreme Court. The Third Circuit did recognize that the Seventh Circuit, in *Talbott*, and the Eleventh Circuit in *Deleveaux*, had addressed the same issue and reached different conclusions. The Third Circuit agreed with the Eleventh Circuit that the burden of persuasion on a justification defense to a felon in possession charge should be upon the defendant. 225 F.3d at 350. However, the Third Circuit made clear that it was deciding only who should bear the burden of persuasion on a justification defense to a felon in possession charge, "not the more general question of the placement of the burden of persuasion on affirmative defenses that do not negate an element of the offense." *Id.* at 346-47. The Court also stated that it did "not believe that the duress or coercion cases are sufficiently similar to the justification scenario so as to be dispositive of this case, even were these duress and coercion cases to be uniform in their allocation of the burden of persuasion." *Id.* at 349 n.6. Earlier, the Third Circuit had refused to shift the substantive burden of proof to the defendant in a coercion case. *United States* v. *Santos*, 932 F.2d 244 (3rd Cir. 1991). "[T]o the extent that the charges against a defendant require the government to prove that the criminal acts were done with criminal intent, the government should from the outset bear the burden of disproving duress beyond a reasonable doubt once the defendant has introduced sufficient evidence concerning each element of the defense." *Id.* at 249.

*Deleveaux*, 205 F.3d at 1300; *Dominguez-Mestas*, 929 F.2d at 1384; *Willis*, 38 F.3d at 179 n.12.

This Court has expressly rejected this rationale. In *Tot* v. *United States*, 319 U.S. 463, 469 (1943), the Court explained that a defendant's greater familiarity with the facts, or his consequent ability to obtain information, cannot, standing alone, justify imposing the burden of persuasion upon the defendant. *Id.* The rationale proves too much in that it would justify placing the burden of proof upon all criminal defendants. *Id.* at 469.

A defense of duress or coercion necessarily involves the actions of others and a particular set of observable circumstances. While the reasonableness of a particular defendant's perceptions of those circumstances may be at issue (as here, where the defense sought to demonstrate the effects of domestic abuse upon the judgment of a female victim), prosecutors have ample opportunity to demonstrate to the jury that neither the actions of others nor the circumstances at hand were sufficiently coercive or threatening to render the defendant's actions reasonable. Moreover, trial courts, acting as evidentiary gate-keepers pursuant to Fed. R. Evid. 401-403, and as arbiters of proper instructions pursuant to Fed. R. Crim. P. 30(b), need not permit defendants to present evidence that is not sufficiently probative or give instructions where the defense has not satisfied its burden of production. See *Bailey*, 444 U.S. at 416 (affirming district court's refusal to give duress instruction on the ground that defendants had not made "threshold showing" in support of the instruction). The concerns that the Ninth Circuit expressed in *Dominguez-Mestas*, 929 F.2d at 1384 regarding persons who "cannot be located" or are "not subject to subpoena power" are therefore groundless.

The instant case highlights the paucity of the rationale supporting the burden shifting rule. Here, prosecutors had ample notice and opportunity to investigate, to cross-examine

petitioner's witnesses and even to evaluate petitioner's abuse claims using their own expert. Prosecutors investigated petitioner by searching her home, contacting her apartment manager, investigating her residential history, investigating her children's schools and even checking the records of the jail where petitioner was in custody. Here also, prosecutors had access to Wright, her principal abuser, and to Hillary, one of his accomplices. Both were present and in custody, pursuant to writs ad testificandum, at the same federal building in which petitioner's trial was held. Both had previously given statements to the ATF Agent. JA 731-41. Thus, the prosecution's decision to call neither to the stand to rebut petitioner's duress defense was its own.

Accordingly, the prosecution in this case utilized the same tools and techniques that any party uses to prepare and try a case in the courtroom. As in any other case, the prosecution has substantial resources that allow it to investigate facts and circumstances, find and present witnesses, and to present the results of their efforts to a jury. In short, duress cases present no special burden upon the prosecution that is not already present in any defense that controverts a *mens rea* element.[49]

At best, the rationale offered by the Fifth, Ninth, and Eleventh Circuits supports a rule that requires the defendant to bear the burden of production in support of the duress defense. That is the rule in every circuit to have addressed the question. Petitioner is not opposed to such a rule, and recognizes that the prosecution cannot be responsible for producing evidence and disproving every possible contingency in a criminal case. Therefore, it is certainly fair that the defendant be responsible for putting forth sufficient evidence to support her defense before the jury can be

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[49] Even where the defendant is the only witnesses to claimed duress or coercion, the prosecution's opportunity to cross-examine affords it access to the most knowledgeable witness and provides ample opportunity to impeach.

instructed on the defense. What is neither justified in accordance with the development of the common law, nor reasonable, is a rule that converts the jury's assessment of the evidence in support of her duress defense into a civil trial. Accordingly, this Court should adopt the majority rule prohibiting such burden shifting in duress cases to govern all federal trials.

## II. THE FIFTH CIRCUIT'S BURDEN-SHIFTING RULE VIOLATES FIFTH AMENDMENT DUE PROCESS PROTECTIONS.

This Court's opinion in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), holds that the Due Process Clause forbids shifting the burden of persuasion to the defendant on an element of the offense. See also *Davis* v. *United States*, 160 U.S. 469 (1895), *In re Winship*, 397 U.S. 358 (1970), and *Patterson* v. *New York*, 432 U.S. 197 (1977). The Court explained that shifting the burden of persuasion of an element of the offense places a great strain on the defendant because "he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact." 421 U.S. at 702 n.31. Moreover, shifting the burden of persuasion on a "critical fact in dispute" increases further the likelihood of an erroneous murder conviction. *Id.* at 701. Petitioner's duress defense controverted the *mens rea* required for conviction and thus, shifting the burden of persuasion to petitioner required petitioner to bear the burden of proof with regard to the *mens rea* component of the charged crimes.

This Court has long held that *mens rea*, as a component of the prosecution's burden in criminal cases, cannot be separated from the "universal and persistent . . . belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *Morissette*, 342 U.S. at 250); see also *Liparota* v. *United States*, 471 U.S. 419, 425-26 (1985) (same). Thus, "the

consequent ability . . . to choose between good an evil" is a fundamental component of the intent element of crimes.

The logical corollary to the Court's expositions of *mens rea* is that where the will is overborne, or the defendant has otherwise been deprived of the ability to choose for herself, then the roots of *mens rea* have been cut. Or, put differently, *mens rea* presupposes freedom of choice and, *a fortiori*, without a free choice, there can be no *mens rea*. Accordingly it defies reason to speak of a defendant who possessed the necessary *mens rea*, but is nonetheless not guilty because another person deprived the defendant of the choice not to commit the act.

Moreover, in assessing what constitutes an element of a particular crime "the relevant inquiry is one not of form, but of effect." *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000). Plainly the effect of raising a duress defense is to dispute the prosecution's claim that the defendant's actions were the product of her own intentions. The defense therefore goes to the core premise of the *mens rea* element, that the desire to commit a criminal act was the product of a free choice.

It is no answer to the stark principle that a duress or coercion defense negates *mens rea* to claim that the cases from which this principle is drawn involved a heightened means rea element, or "specific intent" that required the prosecution to demonstrate that the defendant acted with an evil mind as opposed to acting with mere intention or in the absence of mistake or accident. The criminal statutes at issue in *Morissette* and *Liparota* specified only that the offense must be committed knowingly. See *Morissette*, 342 U.S. at 248 (addressing 18 U.S.C. § 641, which provides that "'whoever embezzles, steals, purloins, or *knowingly* converts' government property is punishable by fine and imprisonment" (emphasis added)); see also *Liparota*, 471 U.S. at 419, 420 (addressing the Food Stamp Act of 1964, 7 U.S.C. § 2024(b)(1) and whether the "defendant *knew* that his

acquisition or possession of food stamps was in a manner unauthorized by statute or regulations" (emphasis added)). The Court's opinion in *Staples*, 511 U.S. at 602, 603, concerned a statute, 26 U.S.C. § 5861(d), that specifies no level of intent. In sum, these cases in no way stand for the proposition that a broad conception of *mens rea* – one which a duress defense controverts – is limited only to crimes with a heightened *mens rea* or specific intent.

The vast bulk of petitioner's charges (Counts Two through Nine) alleged violations of 18 U.S.C. § 922(a)(6) which forbids "*knowingly* [making] any false or fictitious oral or written statement . . . with respect to any fact material to the lawfulness of the sale" (emphasis added).[50] The remaining count, Count One of petitioner's indictment charged a violation under 18 U.S.C. § 922(n) (possession of a forearm while under indictment) which requires a showing that she "willfully" violated a prohibition on the receipt of a firearm by a person under indictment. *Id.* § 924(a)(1).

Affirmative defenses that present evidence of an overborne will (duress), or of the absence of a lawful alternative choice (self-defense, necessity), thus traverse the *mens rea* element by demonstrating that the core component of *mens rea*, freedom of choice, was absent. Indeed, alleged imperfections in these defenses go to the very same issues of autonomy and choice. For example, a demonstration that there was no casual connection between the criminal action taken and avoidance of the threatened harm will defeat a claim of duress (Model Penal Code § 3.02(1), (2) (1974)), and the absence of a reasonable threat will defeat a claim of self-defense. In either instance, the imperfection demonstrates that the defendant's actions were not solely governed by circumstances

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[50] *See also* 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.")

interposed by other others, but by the defendant's own misperceptions.

Under the Fifth Circuit's procedure, the issue was not whether petitioner's duress evidence created a reasonable doubt, but whether it demonstrated, by a preponderance of evidence, that she was under duress. This relieved the prosecutors of their *Winship* burden to prove to the jury beyond a reasonable doubt that the defendant's actions were hers alone. Instead, the prosecutors here needed only rebut the defendant's evidence sufficiently to permit jurors to conclude that it was more likely than not that the defendant acted of her own accord. On this question the jury was to treat the matter as if it were a civil trial, with the presumption of innocence lost by virtue of the fact that the jury was told that petitioner had to persuade them of her lack of criminal intent.

The Court's existing decisions permitting burden shifting are distinct in that each involve significant deference to state statutes expressly shifting the burden of proof on specific affirmative defenses. See *Leland* v. *Oregon*, 343 U.S. 790 (1952), *Martin* v. *Ohio*, 480 U.S. 228 (1987), and *Patterson* v. *New York*, 432 U.S. 197 (1977). Nonetheless this is not a ground to distinguish them, given that the due process principle described above must operate to the same effect in both federal and state courts. Each case attempts to avoid the argument that the prosecution has been relieved of proving its case beyond a reasonable doubt by contending that the affirmative defense at issue and the elements of the crime charged did not "overlap." *E.g.*, *Martin*, 480 U.S. at 234. These contentions fail, to the extent that each of the defenses at issue in fact addressed the *mens rea* component of the crime.[51] Because due process requires that the substantive

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[51] The dissent in *Leland* pointed out that Oregon's law violated due process because it required "the accused to prove . . . the absence of one of the essential elements for the commission of murder, namely, culpability."

burden of proving any defense addressing a *mens rea* component cannot be imposed on the defense, these decisions must be limited with respect, at least, to duress or coercion defenses

The opinion in *Martin* v. *Ohio* attempts to avoid the holding of *Winship* by observing that the jury's instructions did not exclude consideration of the self-defense evidence in deciding whether the prosecution had proven its case beyond a reasonable doubt. But that effort is inconsistent with other decisions of this Court, 480 U.S. at 238 n.1 (Powell, J., dissenting) and, as discussed above, with common sense. When instructed to deal with a certain class of evidence in a certain specific way, jurors must be presumed to do so. Further, as the dissent observes, the majority opinion cannot blithely ignore the significance of the fact that evidence in support of self-defense may negate the element of purposefulness. *Mullaney*, *Winship* and even *Patterson* unequivocally hold that where a defense serves "to negative any facts of the crime which the state is to prove in order to convict" the burden may not be shifted. *Patterson*, 432 U.S. at 197. For these reasons, the reasoning of *Martin* v. *Ohio* cannot stand.

At bottom, the duress defense traverses a fundamental component of *mens rea*, freedom of choice. Because the Due Process Clause requires that the prosecution must prove each and every element, including *mens rea*, beyond a reasonable doubt, no court can constitutionally relieve the prosecution of that burden in a duress case by shifting the burden to the defense on this specific issue. Accordingly, the Court should reverse the Fifth Circuit's opinion as violative of Due Process.

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343 U.S. at 804 (Frankfurter, J. dissenting). Similarly, in *Martin* v. *Ohio*, the dissent explained that self-defense disputes the element of "prior calculation and design" in Ohio's aggravated murder statute. 480 U.S. at 238-39 (Powell, J. dissenting).

## III. THE ERROR COMMITTED IN THIS CASE WAS STRUCTURAL AND REQUIRES AUTOMATIC REVERSAL.

This case involves a "structural error" that requires automatic reversal. See *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (explaining that a "structural" error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"). Allocations of burden of proof affect the substantial rights of a criminal defendant in that they fundamentally affect the manner in which a fact finder assesses and weighs evidence. In this case, the preponderance of the evidence jury instruction converted the trial from a criminal to a civil trial on the issue of *mens rea*. The prosecution was thus relieved of its burden to prove petitioner's guilt beyond a reasonable doubt. Therefore, the error in this case infected the entire trial process and can not meaningfully be subjected to a harmless error analysis.

As this Court has explained, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). Thus, any attempt to determine what the jury would have done if the trial court had properly instructed them on the reasonable doubt standard requires "pure speculation." *Id.* Petitioner was denied her right to a jury verdict of guilt beyond a reasonable doubt and that error "unquestionably qualifies as 'structural error.'" *Id.* at 281-82.

Even if this Court finds that the error in this case does not fit into the limited class of "structural" error cases, the Court must still overturn the conviction because the prosecution can not demonstrate that the error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); Fed. R. Crim. P. 52(a) ("[a]ny error, defect, irregularity or variance which does not affect substantial rights shall

be disregarded."). In order to meet its burden, the prosecution must show that there is no reasonable possibility that the error contributed to the defendant's conviction. *Chapman*, 386 U.S. at 24. It cannot do so. Where, as here, a court allocates the substantive burden of proof to an accused to prove her duress defense by a preponderance of evidence, the prosecution is relieved of its burden to demonstrate the *mens rea* component of the charged crime beyond a reasonable doubt. More general instructions to a jury that the prosecution bears the ultimate burden of proof, that the accused is innocent until the prosecution proves her guilty, and that the jury may acquit if it finds reasonable doubt as to any of the charged elements cannot cure this error. Taken as a whole such instructions risk, at a minimum, juror confusion. That is because the more general instructions are in irresolvable tension with a more specific instruction to the jury that it is to handle the evidence concerning duress in a specific fashion.

The instructions here allowed the jury to acquit on the basis of her duress evidence only if that evidence rose to the level of preponderance; that is, only if that evidence persuaded the jury that it was more likely than not that she was acting under duress. The jury was also instructed that it could acquit if it found reasonable doubt as to any element of the crime charged. JA 305. Because duress defenses necessarily controvert the *mens rea* component of crimes, the jurors could not reasonably weigh the duress evidence under both standards. When a court gives a specific instruction with regard to the jury's weighing of a certain type of evidence, it is logical that jurors will follow that specific instruction with regard to that specific evidence. Accordingly, any attempt by one juror to contend that the petitioner's duress evidence created reasonable doubt would be countered by other jurors with a reference to the court's specific instruction as to that

defense.[52] Because courts presume that jurors follow their instructions, see *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), it must be assumed that jurors have done so with respect to the specific instruction on the duress evidence.

Even under the Fifth Circuit's stringent definition of the duress defense, the District Court found that petitioner had

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[52] The following hypothetical deliberation among jurors illustrates the potential for juror confusion that the instructions created and the substantial likelihood that the error affected the outcome of this case.

Juror A: I have some real doubt about whether she is guilty. I think is quite possible that her boyfriend made her do this and that she did not herself want to do this at all.

Juror B: So you are saying you believe her duress defense?

Juror A: Well, I'm not saying I think it's for sure that the boyfriend made her do it, but I think that's quite possible given her testimony and the situation that she was in with these bad guys.

Juror B: OK, then, so are you convinced that she wasn't responsible for her actions? Because our jury instruction says that in order to find her not guilty because of the duress, we have to find it more likely than not that she was under duress.

Juror A: I don't know that I'm totally convinced in that way. But I've got concerns.

Juror B: Concerns aren't enough. The instruction says we have to be persuaded by a preponderance of the evidence.

Juror A: I don't suppose that her evidence is all that strong.

Juror B: Then her defense doesn't work.

Juror A: I guess that's right.

Plainly, Juror A's reasonable doubts – based solely on the defense evidence of duress – are trumped by the specific instruction on that defense. Yet the prosecution has not made its case as to the defendant's criminal intent beyond a reasonable doubt. Thus, "'when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside.'" *Martin*, 480 U.S. at 238 n.1 (Powell, J., dissenting) (quoting *Francis* v. *Franklin*, 471 U.S. 307, 323 n.8 (1985)).

adduced sufficient evidence to warrant a specific instruction on her defense. JA 290. That evidence came not only from petitioner, but also from her teenage daughters. Even the evidence adduced by the prosecution tended to support petitioner's claim of duress. The prosecution's evidence indicated that her environment was a violent one, that she was in the constant company of other individuals (those whom she claimed were abusing her and her daughters), and that these same individuals accompanied her to both gun shows and at each purchase or attempted purchase. JA 63, 65, 68-69, 71-72, 76-78, 78-79, 81-82, 91, 92-94, 99-101, 102, 103; SF 207-08. The prosecution's evidence also indicated that the guns were not hers in so far as none were found following a search of her apartment. SF 262. Taken as a whole, the evidence of duress was sufficient to create a reasonable doubt as to her guilt of the charged offenses.

Petitioner also attempted to present additional evidence in support of her defense, principally the testimony of an expert on domestic violence who would have testified to the affects of such violence and the threat of violence on the reasoning and judgment of women who are victimized at the level that petitioner was. The District Court improperly excluded that evidence, SF 727, as well as statements against penal interest made by her abusers who were felons. SF 723-25. Those statements, given to an ATF agent, were admissions that they had purchased guns through petitioner. Def. Ex. 6; SF 731-33.

Petitioner's duress defense was her sole defense at trial. Because her duress evidence was sufficient to warrant an instruction, JA 290, and because the instruction given to the jury was an error affecting her fundamental rights, there is a reasonable possibility that the error contributed to the

outcome.[53] *Chapman*, 386 U.S. at 24. Thus, the error in this case was not harmless.

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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[53] Even under the more stringent harmless error standard for non-constitutional errors (*i.e.* whether it is highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict), the conviction can not stand. *See Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946).

# APPENDIX

## UNITED STATES STATUTES

18 U.S.C. § 17. Insanity defense

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed

manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this

paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless—

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed

manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a

rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are .....

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by

the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who[1] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to

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[1] So in original. The word "who" probably should not appear.

the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor

or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the

component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection—

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is—

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

*Provided, however,* That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or

any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which—

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the[2] House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

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2 So in original. Probably should be "of the".

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from

importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to—

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless—

(A) after the most recent proposal of such transfer by the transferee—

(i) the transferor has—

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that—

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only—

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee—

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who—

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in

section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to—

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law—

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless—

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall—

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if—

(A)(i) such other person has presented to the licensee a permit that—

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to—

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile—

(i) in the course of employment, in the course of ranching or farming related to activities at the

residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except—

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who

possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas—

(1) Definitions.—In this subsection—

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.—Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is—

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is—

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver—

(A) Conditions for waiver.—Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if—

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.—Each petition under subparagraph (B) shall—

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.—The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner—

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

[APPENDIX A Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

REPEAL OF SUBSEC. (P)

<Pub.L. 100-649, § 2(f)(2)(A), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1(1), Dec. 9, 2003, 117 Stat. 2481, provided that, effective 25 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of

Pub.L. 100-649, set out as a note under this section], subsec. (p) of this section is repealed.>

ENACTMENT OF SUBSEC. (Z)

<Pub.L. 109-92, § 5(c)(1), (d), Oct. 26, 2005, 119 Stat. 2099, 2101, provided that, effective 180 days after October 26, 2005, subsec. (z) of this section is enacted to read as follows:>

<(z) Secure gun storage or safety device.—>

<(1) In general.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.>

<(2) Exceptions.—Paragraph (1) shall not apply to—>

<(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or>

<(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or>

<(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);>

<(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or>

<(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.>

<(3) Liability for use.—>

<(A) In general.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.>

<(B) Prospective actions.—A qualified civil liability action may not be brought in any Federal or State court.>

<(C) Defined term.—As used in this paragraph, the term "qualified civil liability action"—>

<(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—>

<(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and>

<(II) at the time access was gained by the person not so authorized, the handgun had

been made inoperable by use of a secure gun storage or safety device; and>

<(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.>

18 U.S.C. § 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense

under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a

crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in

relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure,

forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by

clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions

different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign

commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

AMENDMENT OF SECTION

<Pub.L. 100-649, § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 101-647, Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1, Dec. 9, 2003, 117 Stat. 2481, provided that, effective 25 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under 18 U.S.C.A. § 922], subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter"; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesig-nated as subsecs. (f) through (n), respectively.>

AMENDMENT OF SUBSEC. (A)(1) -

<Pub.L. 109-92, § 5(c)(2)(A), (d), Oct. 26, 2005, 119 Stat. 2100, 2101, provided that, effective 180 days after October 26, 2005, subsec. (a)(1) of this section is amended by striking "or (f)" and inserting "(f), or (p)".>

ENACTMENT OF SUBSEC. (P)

<Pub.L. 109-92, § 5(c)(2)(B), (d), Oct. 26, 2005, 119 Stat. 2100, 2101, provided that, effective 180 days after October 26, 2005, subsec. (p) of this section is enacted to read as follows:>

<(p) Penalties relating to secure gun storage or safety device.—>

<(1) In general.—>

<(A) Suspension or revocation of license; civil penalties.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—>

<(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or>

<(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.>

<(B) Review.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).>

<(2) Administrative remedies.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.>

Supreme Court, U.S.
FILED
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No. 05-7053

# In the Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

This Court granted the petition for a writ of certiorari limited to question one as presented in the petition, which asks: Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

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# In the Supreme Court of the United States

No. 05-7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER

*v.*

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*ON WRIT OF CERTIORARI*
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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (J.A. 325-332) is reported at 413 F.3d 520.

### JURISDICTION

The judgment of the court of appeals was entered on June 20, 2005. A petition for rehearing was denied on July 20, 2005 (J.A. 11). The petition for a writ of certiorari was filed on October 17, 2005, and was granted on January 13, 2006, limited to question one presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was

convicted of one count of acquiring a firearm while under indictment, in violation of 18 U.S.C. 922(n); and eight counts of making a false statement in connection with the acquisition of firearms, in violation of 18 U.S.C. 922(a)(6). She was sentenced to nine concurrent terms of 34 months of imprisonment, to be followed by three years of supervised release, and ordered to pay a $900 special assessment. J.A. 318-321. The court of appeals affirmed. J.A. 325-332.

1. Section 922(a)(6) of Title 18 makes it unlawful "knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive" a licensed firearms dealer "with respect to any fact material to the lawfulness of the sale" of a firearm. 18 U.S.C. 922(a)(6). Section 922(n) makes it unlawful for "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to * * * receive any firearm" that has traveled in interstate or foreign commerce. The relevant sentencing provisions require that a violation of Section 922(n) be committed "willfully." See 18 U.S.C. 924(a)(1)(D).

2. On January 4 and 11, 2003, petitioner purchased multiple firearms at two separate gun shows in Texas by providing false information to gun dealers. Petitioner provided an incorrect address and stated that she was not under indictment for a felony, when in fact she was under federal indictment for her role in a check-cashing scheme. J.A. 13-15, 326.[1] In each instance, the dealer

[1] At the time of both gun shows, petitioner had pleaded guilty to the check-cashing scheme but had not yet been sentenced. J.A. 158, 213-214, 222. She nevertheless remained "under indictment." See *United States* v. *Chapman*, 7 F.3d 66, 67-68 (5th Cir. 1993), cert. denied, 512 U.S. 1223 (1994).

sold petitioner a firearm after running her information through the National Instant Criminal Background Check System and receiving a "proceed" response. J.A. 326.

3. a. On March 5, 2003, a federal grand jury returned an indictment charging petitioner with one count of acquiring a firearm while under indictment and eight counts of making false statements in connection with acquiring a firearm. J.A. 13-17.

At trial, petitioner admitted that she was under indictment for a felony when she purchased the firearms, and that she knew at the time of the purchases that she was under indictment. J.A. 222; see J.A. 173. She further testified that on each of the forms that she completed in order to purchase the firearms she made several false statements, including denying that she was under indictment and lying about her current address. J.A. 221-222. She acknowledged that she understood that the gun dealers wanted her to answer truthfully and that she signed a statement on the form attesting that her answers were truthful. J.A. 222. She further admitted that "I knew I was" committing a crime when she purchased the first firearm and each of the firearms thereafter. J.A. 222, 239.

In defense, petitioner claimed that her boyfriend, Thomas Earl Wright, had coerced her into purchasing the firearms. Petitioner testified that she had been in an abusive relationship with Wright for several months and that the abuse escalated in December 2002 and January 2003. J.A. 158-159, 163-164, 166, 215. Petitioner testified that on the evening before the January 4 gun show, Wright awakened her and announced that they were going to a gun show and that she was going to purchase some guns for him. According to petitioner, at

that time, Wright pointed a gun at her face, threatened to kill her, and split her lip. J.A. 170-171.[2] Petitioner further testified that the following day, she, Wright, Wright's sister, and two of Wright's companions went to the gun show. She claimed that Wright instructed her on which guns to purchase and how to fill out the forms for the dealers, and he provided her with money to make three purchases. She testified that she complied with his requests because she was afraid that Wright would kill her or her daughters if she did not. J.A. 173-177. She claimed that Wright told her that someone was home with her daughters and that they were only a telephone call away. J.A. 171.[3]

Petitioner testified that, after the January 4 gun show, her relationship with Wright deteriorated further. J.A. 178-179. She claimed that, one week after the first gun show, on January 11, Wright again awakened her, pointed a gun at her, and made her go to another gun show with him and one of his companions. J.A. 180-181. She purchased four additional firearms at that gun show, and testified that she did so because she was afraid that Wright would kill her or that something would happen to her daughters. She testified that a fifth

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[2] On cross-examination, petitioner testified that it was late on Friday night when Wright awakened her, that she went back to sleep and slept until approximately 2 p.m. Saturday afternoon, and that they went to the gun show about an hour later. J.A. 216.

[3] Although petitioner's description of her abusive relationship with Wright was largely corroborated by her daughters Ve'Queshia and Jocelyn, aged 16 and 14 at the time of trial, J.A. 106-149, Ve'Queshia testified that she and her sisters were alone at home while her mother went to the first gun show, and that her mother returned alone in her car from that show, arriving before Wright. J.A. 119-120; see J.A. 225-226 (petitioner admitted that she returned home before Wright, but contended that Wright's sister was with her).

attempted purchase failed, but that she persisted in attempting to make the purchase under threats from Wright. J.A. 181-189.

On cross-examination, petitioner admitted (as she had on direct), that she did not believe that Wright would harm her while they were at the gun shows. J.A. 175, 189, 239 ("I didn't think it was going to happen right then and there."). She testified that they were at each gun show for a couple of hours, wandering around and looking at guns. J.A. 224, 242. She further admitted that there were security guards at both gun shows, but that she did not alert them to the fact that she was being forced to purchase firearms. J.A. 220. She admitted that she did not tell any of the gun dealers that she was being threatened, nor did she indicate when she filled out the forms that she was under any kind of duress. J.A. 240 (admitting that she did not write "help me" or "I am being threatened" on the forms). She also admitted that if she had answered the questions on the forms truthfully, she could have avoided purchasing the firearms, which she claimed she did not want to do. *Ibid.*

Petitioner also testified—and her daughters confirmed—that on or around the day of the second gun show, the police had been summoned to her apartment as a result of a disagreement that petitioner was having with one of Wright's associates. J.A. 234-236; see J.A. 126-127, 141. Petitioner admitted that she spoke with the police at that time, but that she did not report to them that she was being abused by Wright or that she had been forced by him to purchase firearms. J.A. 234-

236; see J.A. 126-127, 141.[4] Petitioner also admitted that between the first and second gun shows, her daughters continued to attend school. J.A. 237. She further admitted that she never called the police to send a car to the school to ensure their safety, nor did she tell her daughters to tell the teachers, counselors, or security personnel at the school to report the dangerous situation that her family was experiencing or to call their grandparents for help. J.A. 237, 245. She agreed that she had been negligent in letting her daughters return home and in not calling the police, and that those were options available to her. J.A. 233-234, 237.[5]

During the government's case, the gun dealers who sold firearms to petitioner at the two gun shows testified that while petitioner was accompanied by several young black males, her companions did not appear to be controlling her purchases or advising her on what to pur-

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[4] Petitioner further admitted that towards the end of her marriage with her ex-husband, she had obtained a restraining order against him. J.A. 199.

[5] In addition, petitioner admitted that, from November 2002 through January 2003, she had telephone and in-person contacts with her pretrial services officer and her attorney in the check-cashing case (J.A. 210-212; see J.A. 128, 144-145), as well as her mother, father, stepfather, sisters, and ex-husband (J.A. 208-210, 213-214, 232-233), but that she never told any of them that she was being abused by Wright or that he had forced her to purchase firearms illegally. She further admitted that on January 15, 2003, four days after the second gun show, she appeared in federal district court, after meeting with her attorney, to be sentenced in the check-cashing case. She did not tell her attorney or the district court that she was being abused, or that she had been forced to buy firearms at the gun shows. J.A. 213-214. Finally, while petitioner insisted that she was afraid at the time of the firearms purchases that Wright would kill her or her children, she placed Wright's name on her visitation list at the jail following her arrest on the firearms charges. J.A. 248-251.

chase; one dealer testified that the young men accompanying petitioner appeared bored. They all testified that if they had believed that petitioner was making a straw purchase on behalf of someone else, they would not have sold her the firearms because such a transaction would have been an illegal one for which they could have lost their dealer's license. J.A. 61-62, 76-82, 84-85, 87, 91, 94, 100, 103-104. While one gun dealer's wife, who assisted her husband at the January 4 show, testified that it appeared that petitioner was unsure which gun to purchase and that petitioner's companion was possibly providing her with information about the guns, she also testified that petitioner did not appear to be anxious or afraid. J.A. 66-69. Further, many of the gun dealers testified that the men accompanying petitioner remained in the background during their transactions with petitioner. J.A. 80, 91-92, 94, 100. One dealer testified that at one point, petitioner returned to his table at the show to report that an attempted purchase from another dealer had been delayed, and that on that occasion petitioner was by herself. J.A. 83.

Another dealer—the one who received the "delay" response when he conducted a criminal background check on petitioner (J.A. 95-99)—testified that petitioner angrily insisted that she had been able to purchase firearms from other dealers and that she ultimately had accused the dealer of "ripping" her off, stating: "I can buy a gun anywhere in this show except for you." J.A. 98-99. The dealer testified that petitioner also was "mad" that he would not return the nonrefundable $15 transaction fee. J.A. 99. This same dealer testified that petitioner had approached his sales area several times during the course of her attempted purchase from him and that she was "alone as far as any

transactions." J.A. 100. He explained that "[w]hen she came back the second or third time, I thought there were perhaps two men in the background," but "[t]hey never got into the conversation at all." *Ibid.*[6]

b. At the charge conference, the government objected to the jury receiving any instruction on the defense of duress on the ground that petitioner had failed to introduce evidence sufficient to warrant an instruction. J.A. 290; see J.A. 252-256. The district court overruled the government's objection. The court believed that whether the evidence warranted an instruction was "frankly a close call in my mind, but when it is a close call, better to give it than not." J.A. 290. For her part,

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[6] In support of her duress defense, petitioner sought to introduce expert testimony from Dr. Toby Myers about the reactions of battered women to their abusers. The district court held that Myers's testimony was inadmissible to show duress because it addressed petitioner's subjective perceptions of her situation, and the duress defense turns on how an objectively reasonable person would have acted under the circumstances. Tr. 727; J.A. 257-258; see J.A. 326-327. The district court also disallowed testimony proffered from the defense by Alcohol, Tobacco and Firearms Agent Kelly Oates. Petitioner sought to elicit from Oates out-of-court statements made by Wright and one of his companions after petitioner's arrest to the effect that petitioner had purchased the firearms for them because they were convicted felons and could not purchase firearms themselves. Tr. 724-725, 728, 731-740; see J.A. 332. Defense counsel argued that the statements were admissible pursuant to Federal Rule of Evidence 804(b)(3) because the statements were against Wright's penal interest and Wright was unavailable to testify, inasmuch as Wright's attorney had represented that Wright would exercise his Fifth Amendment privilege against self-incrimination. Tr. 733-734, 738. The district court held (Tr. 738-740) that Wright's statements did not satisfy the requirements of Rule 804(b)(3) because they were not exculpatory of petitioner and because corroborating circumstances did not "clearly indicate the trustworthiness of the statement." Fed. R. Evid. 804(b)(3).

petitioner requested that the district court instruct the jury that she had the burden of producing evidence to support each element of the duress defense and that, if she did so, "then the government must prove beyond a reasonable doubt the absence of duress or coercion." J.A. 47; see J.A. 45-48, 300. The court denied that request. J.A. 300.

In its instructions, the district court set forth, *inter alia*, the elements of the firearms offenses and informed the jury that the government had to prove each element of the offenses beyond a reasonable doubt. J.A. 310-312. The instructions admonished that the jury should make that determination after consideration of "all the evidence in the case." J.A. 305; see J.A. 307. The district court further instructed the jury that "[i]f you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should nevertheless be found 'not guilty' because her actions were justified by duress or coercion." J.A. 312. The court set forth the elements of the duress defense, and instructed the jury that petitioner had "the burden of proof to establish the defense of duress by a preponderance of the evidence." *Ibid.*

The jury found petitioner guilty on all counts. J.A. 316-319.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in instructing the jury that petitioner bore the burden of proving her duress defense by a preponderance of the evidence. J.A. 332. The court explained that the defense has four requirements: (1) a present and imminent threat of "such a nature as to induce a well-grounded apprehension of death or serious bodily injury," such that "a person of

reasonable firmness in [petitioner's] situation would have been unable to resist the threat"; (2) no reasonable, legal alternative to violating the law; (3) no negligent or reckless conduct by petitioner that placed her in a situation in which it was probable that she would be forced to choose the criminal conduct; and (4) a direct causal relationship between the criminal action and avoidance of the threatened harm. J.A. 328 (internal quotation marks and citations omitted).[7] Relying on circuit precedent, the court held that "[s]ince a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." J.A. 332 (quoting *United States* v. *Willis*, 38 F.3d 170, 179 (5th Cir. 1994), cert. denied, 515 U.S. 1145 (1995)).[8]

## SUMMARY OF ARGUMENT

A defendant must bear the burden of proof on the affirmative defense of duress. Because the concept of a duress defense is deeply rooted in the common law, it represents a background principle that may be read into federal criminal statutes absent a contrary congressional intent. Cf. *United States* v. *Bailey*, 444 U.S. 394, 409-410, 415-416 n.11 (1980). But consistent with the

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[7] Petitioner does not contest the court of appeals' statement of those elements.

[8] The court of appeals also rejected petitioner's claims that the district court erred in excluding Dr. Myers's testimony and Wright's out-of-court statements. J.A. 327-331. Although petitioner devotes (Pet. Br. 9-13) considerable space in her brief to discussing Dr. Myers's proffered testimony, this Court did not grant review on the question in the petition for a writ of certiorari (see Pet. i) that challenged the exclusion of her testimony. See 126 S. Ct. 1139 (2006).

common law and its underlying policies, a defendant must bear the risk of non-persuasion of the issue of duress by establishing that defense by a preponderance of the evidence.

A. The defense of duress responds to the notion that a defendant who committed a crime because of the coercive effect of a threat of imminent death or serious bodily injury should not be punished criminally, even though she has violated the criminal law. But the defense has never been a favored one. Rather, it has always been surrounded by strict rules of proof to prevent abuses. One of those rules is that defendants must carry the burden of proof to establish duress.

Sound policy considerations support the common-law rule. The burden of proof is sensibly allocated to the party that has readier access to the facts supporting the defense. Allocating the risk of non-persuasion to the defendant also accords with the policy of making it more difficult to establish a disfavored defense. And the common law frequently assigned the burden of proof to the party seeking to establish the less likely or more unusual occurrence.

B. All of those considerations are applicable to the duress defense. First, a defendant is in a substantially better position than the government to produce evidence that she has been subject to duress. Second, the government will often find it difficult to obtain evidence to refute the defense. Third, requiring the defendant to carry the burden of proof helps to protect against false claims of duress—a substantial concern with a defense that is easy to assert but hard to disprove. Finally, requiring the government to shoulder the burden of proof—beyond a reasonable doubt—to refute duress would impose substantial costs on society.

Petitioner contends that only one practical consideration supports placing the burden of proof on the government, namely, avoidance of the risk of jury confusion on the burden of proof of guilt. But this Court has already rejected that argument, recognizing that juries are readily capable of making distinctions between the burden to establish guilt and the burden to establish an affirmative defense. *Leland* v. *Oregon*, 343 U.S. 790 (1952).

C. Petitioner cannot establish that there is any common-law trend that supports placing the burden of proof on the government. *Davis* v. *United States*, 160 U.S. 469 (1895), which departed from the common law by requiring the government to disprove the defense of insanity beyond a reasonable doubt, rested on a particular view about the relationship between the insanity defense and the mens rea required for the murder offense at issue. Not only has Congress rejected the result in *Davis* by statute—thus making *Davis* a questionable foundation and signaling that Congress's views are, in fact, closer to that of the common law than to the reasoning in *Davis*—but the established presumption when Congress expressly creates an affirmative defense is that the defendant must "set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922). The same presumption should apply to defenses that are borrowed from the common law and read into federal statutes, and whose common-law origins placed the burden of proof on the defendant.

In any event, the rationale of *Davis* does not apply to the common-law defense of duress. The common-law defense of duress clearly does not negate the mens rea element of the offense. Rather, the duress defense applies only when the defendant has committed both a vol-

untary act and had the mens rea required for the crime. *Bailey*, 444 U.S. at 402. Duress goes to the motivation for the crime—not to whether the defendant had the mental state necessary for its commission. The lower federal courts have recognized the distinction between motive and mens rea as applied to the defense of duress. And the current general trend in the lower federal courts requires the defendant to bear the burden to prove duress.

D. Finally, there is no constitutional impediment to placing the burden of proof on a defendant claiming duress. This Court has settled that the reasonable-doubt standard applies to the elements of an offense as defined by the legislature, not to affirmative defenses. See *Martin* v. *Ohio*, 480 U.S. 228 (1987); *Patterson* v. *New York*, 432 U.S. 197 (1977). That rule cannot be avoided here on the theory that evidence of duress may also be relevant to mens rea; the same argument was rejected in *Martin*. And there is no basis for viewing duress as implicating a "fundamental component of *mens rea*, freedom of choice," Pet. Br. 45, such that due process requires the government to disprove duress. Freedom of choice in that sense is not a component of mens rea; indeed, the entire point of the duress defense is that the defendant made a choice to commit a crime in order to avoid a threatened harm. It is not fundamentally unfair to require a defendant to bear the risk of nonpersuasion that her choice to commit a crime was the product of coercive threats that gave her no reasonable alternative but to violate the criminal law.

## ARGUMENT

### A DEFENDANT SHOULD BEAR THE BURDEN OF PERSUASION ON THE AFFIRMATIVE DEFENSE OF DURESS

The government proved each of the statutory elements of petitioner's offenses beyond a reasonable doubt. Under Section 922(a)(6), it is unlawful for anyone, in connection with the acquisition or attempted acquisition of a firearm, to knowingly make a false statement that is intended or likely to deceive a licensed firearms dealer with respect to any fact material to the lawfulness of the sale. See 18 U.S.C. 922(a)(6). Section 922(n) makes it unlawful for anyone, while under indictment for a crime punishable by imprisonment for a term exceeding one year, to willfully acquire a firearm that has been shipped or transported in interstate commerce. See 18 U.S.C. 922(n) and 924(a)(1)(D). Petitioner admitted the essential elements of both offenses, including the requirements of knowledge and willfulness. Indeed, petitioner admitted that she knew that her conduct was illegal. J.A. 221-222, 239.

Having admitted the statutory elements of the firearms offenses, petitioner sought to raise the affirmative defense of duress and to saddle the government with the burden to disprove that claimed defense beyond a reasonable doubt. Because "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, * * * a defense of duress or coercion may well have been contemplated by Congress when it enacted" the firearms statute. See *United States* v. *Bailey*, 444 U.S. 394, 415-416 n.11 (1980). It is therefore reasonable for the courts to apply such a defense as a background principle of construction, cf. *Morissette* v. *United States*, 342 U.S. 246, 262-263 (1952), absent con-

trary indication of congressional intent. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-491 (2001) (medical necessity defense to the offense of manufacturing and distributing marijuana held to be "at odds with the terms of the Controlled Substances Act").[9] But the common-law history and rationale for the duress defense, as well as traditional and practical considerations informing the allocation of burdens of persuasion, all point to the conclusion that the risk of nonpersuasion should lie with the proponent of the duress defense. And this Court's precedents compel the conclusion that placing that burden of persuasion on petitioner does not violate the Due Process Clause.[10]

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[9] As the Court recognized in *Oakland Cannabis*, this Court has never definitively held that courts can recognize well-established common-law defenses and that doing so is at least in some tension with the Court's longstanding refusal to recognize common-law crimes. Nevertheless, the federal courts, including this Court, have addressed such non-statutory defenses for almost 200 years since the Court recognized that only Congress could create crimes, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Moreover, the question presented assumes the existence of a duress defense. Nonetheless, the practice of formulating such defenses is one that federal courts should approach with caution, and invitations to depart from the common-law nature of affirmative defenses should be viewed with skepticism.

[10] The term "burden of proof" has been used to refer to two distinct concepts: "the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer* v. *Weast*, 126 S. Ct. 528, 533-534 (2005) (citing *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994)). The issue in this case concerns the allocation of the burden of persuasion. Petitioner does not challenge (Pet. Br. 40-41) the proposition accepted by all of the courts of appeals to have considered

### A. At Common Law, Duress Was An Excuse To Criminal Conduct On Which The Defendant Bore The Burden Of Persuasion

1. Under the common-law affirmative defense of duress, a person is not held criminally liable if, under certain circumstances, he has been forced by another to commit an offense by an unlawful threat of harm. 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.7, at 72 (2d ed. 2003). The defense is one of excuse. As Blackstone explained, "it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." 4 William Blackstone, *Commentaries* *27.[11]

Although the societal justification for the defense is that the defendant's coerced conduct should not be punished, the premise of the defense is that the defendant committed the crime. See *Bailey*, 444 U.S. at 409 ("Duress was said to excuse criminal conduct * * * violating the literal terms of the criminal law."). The rationale of the duress defense is thus not that the defendant has

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the question that the initial burden of producing evidence to support an affirmative defense is properly placed on the defendant. See *Bailey*, 444 U.S. at 415.

[11] The common-law defense of compulsion, recognized as long ago as 1550 in *Reniger* v. *Fogossa*, 75 Eng. Rep. 1 (K.B.), distinguished between the defenses of "duress" and "necessity." See 1 Matthew Hale, *The History of the Pleas of the Crown* 49-57 (1847). "While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *Bailey*, 444 U.S. at 409-410. "Modern cases have tended to blur the distinction between duress and necessity," *id.* at 410, and some courts have used the terms interchangeably.

"somehow los[t] his mental capacity to commit the crime in question" or that he "has not engaged in a voluntary act." 2 LaFave, *supra*, § 9.7(a) at 73. "Rather, it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused because he lacked a fair opportunity to avoid acting unlawfully." *Ibid.* (internal quotation marks omitted).

Because the duress defense operates to free defendants who have committed all of the elements of a criminal offense, the common law recognized that the doctrine "held within it the germs of potential disorder." Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957). "If the doctrine was not to be the plaything of the shrewd and the unscrupulous (and were not those suspected of crimes already questionable in that respect?) it had to be well hedged and strict of proof." *Ibid.* The duress defense was thus disfavored in the common law, in part because of "the difficulty of assessing degrees of participation in joint criminal conduct, of influence and control, of passivity, suggestibility, and so on." See Jerome Hall, *General Principles of Criminal Law* 444 (2d ed. 1960) (noting "judicial hostility" to the defense of coercion); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. Cal. L. Rev. 1331, 1331-1332 (1989).

Accordingly, the common law has long placed several significant restrictions on the duress defense. See 1 Wm. L. Burdick, *The Law of Crime*, § 199, at 262 (1946) ("[T]he doctrine [of compulsion or necessity] is hedged about with certain positive rules of law, and is recog-

nized only in clear cases."). These restrictions include that the defendant must have acted under fear of death or serious bodily harm. *Id.* at 262-263. The fear had to be a reasonable one, and the danger to the defendant had to be imminent and impending. See *ibid.*; Hall, *supra*, at 443. Fear of "future bodily harm do[es] not excuse an offense." Burdick, *supra*, § 199, at 263. The defendant also must bear no "fault or blame" in causing the coercion. See *ibid.* In addition, the defendant must have had no reasonable opportunity to avoid the threatened harm. See 2 LaFave, *supra*, § 9.7(b) at 76-79. As this Court has recognized, "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense[] will fail." *Bailey*, 444 U.S. at 410 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 379 (1972)).

2. Given the traditional distrust of the duress defense—proof of which often consisted of little more than the accused's self-serving assertions—it is not surprising that the common law placed the burden of proof on the defendant. Indeed, this was the common law rule with respect to all affirmative defenses. See Blackstone, *supra*, at *201 ("[A]ll these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed."); Michael Foster, *Crown Law* 255 (2d ed. 1791) ("In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.") (emphasis omitted). This Court repeat-

edly has so recognized. *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) ("[A]t common law the burden of proving [the defense of heat of passion on sudden provocation], as well as other affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant.") (quoting Blackstone, *supra*, at *201); *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987) ("the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove"); *Mullaney* v. *Wilbur*, 421 U.S. 684, 693-694 (1975) (same). Moreover, as petitioner acknowledges (Pet. Br. 18 & n.14), "[t]his was the rule when the Fifth Amendment was adopted." *Patterson*, 432 U.S. at 202.[12]

The historical allocation of the burden of proof at common law accords with basic principles that inform which party should bear the risk of nonpersuasion. Generally, "the party having in form the affirmative allegation" pulls the laboring oar—that is, the proponent of a proposition should prove it, rather than the other party having to prove a negative. 9 John Henry Wigmore, *Evidence* § 2486, at 288 (1981) (emphasis omitted). The burden of proving a fact also is commonly placed on the one "who presumably has peculiar means of knowledge" enabling him to prove it. *Id.* at 290 (emphasis omitted). Furthermore, placing the risk of nonpersuasion on the

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[12] Relying upon scholarly commentary on the case of *The King* v. *Oneby*, 92 Eng. Rep. 465 (K.B. 1727), petitioner contends (Pet. Br. 18 & n.15) that the common-law rule was "the product of flawed reasoning." Petitioner acknowledges, however, that common-law courts in England and the United States did place the burden of proving affirmative defenses on the defendant. *Ibid.* Moreover, this Court has previously noted the same scholarly commentary, see *Mullaney*, 421 U.S. at 694 n.16, but it nevertheless has consistently recognized that the common law placed the burden of proof of affirmative defenses on the defendant.

defendant with respect to the duress defense is consistent with "[t]he policy of handicapping a disfavored contention." 2 John W. Strong, *McCormick on Evidence* § 337, at 413 (5th ed. 1999). Finally, that allocation accords with the "frequently significant consideration" of assigning the burden of proof based on "the judicial estimate of the probabilities of the situation." *Ibid.*; see *ibid.* ("The risk of failure of proof may be placed upon the party who contends that the more unusual event occurred.").

**B. Substantial Practical Considerations Support Placing The Burden On The Defendant To Prove The Duress Defense**

The same general principles that doubtless informed the historical practice of requiring the defendant to prove a claim of duress apply equally forcefully today.

1. First, the defendant will usually be in a far better position than the government to adduce evidence on a purported duress defense. Often, as in this case, the sole evidence of duress will be testimony offered by the defendant and close associates who have an incentive to protect the defendant. As such, if the government bears the burden of disproving duress, "[e]ven if the government is effective in impeaching the credibility of the defendant, it may not meet its burden." *United States* v. *Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir.) (per curiam), cert. denied, 502 U.S. 958 (1991). Moreover, the claim of duress will generally rest on alleged events that occurred before the criminal conduct, *i.e.*, before the events that caused the government to become involved. Because the defendant is the one with better access to knowledge of the facts needed to prove the defense, it is fair to place the burden on him to establish

the defense. See *United States* v. *Unser*, 165 F.3d 755, 765 (10th Cir.) ("Often it is the defendant who is most likely to have access to the facts needed to prove [a defense of necessity], and this case seems to be of that type."), cert. denied, 528 U.S. 809 (1999).[13]

Second, in most cases where a claim of duress is raised, the prosecution will be unable to call the witness most likely to have information bearing on the point: the person alleged to have coerced the defendant into committing the offense. Because such conduct itself constitutes a criminal offense, the person who allegedly made the threat will generally assert his Fifth Amendment rights. This case bears that point out all too well: in seeking to adduce Wright's out-of-court statements (see note 6, *supra*), petitioner's counsel argued at trial that, although Wright was present in the courthouse, he was unavailable to testify because his attorney would advise him to claim his Fifth Amendment privilege against compelled self-incrimination. Tr. 738.[14] Petitioner thus errs in asserting (Pet. Br. 40) that the gov-

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[13] The United States advances "preponderance of the evidence" as the measure of the defendant's burden because that is the standard supported by commentators, see Hall, *supra*, at 443; Newman & Weitzer, 30 S. Cal. L. Rev. at 321, applied by the lower federal courts that place the burden of persuasion on the defendant, see, *e.g.*, J.A. 332; *United States* v. *Deleveaux*, 205 F.3d 1292, 1299 (11th Cir.), cert. denied, 530 U.S. 1264 (2000); *Dominguez-Mestas*, 929 F.2d at 1384, and set forth by Congress in several affirmative defenses in Title 18, see 18 U.S.C. 373(b); 18 U.S.C. 1512(c) (Supp. II 2002); 18 U.S.C. 2320(c).

[14] It is no answer to note that the government has the ability to grant immunity to the person who applied the alleged coercion in order to procure his testimony. That individual may bear equal or even greater culpability for the charged crime, and the government should not be required to surrender or greatly complicate the prosecution of one wrongdoer in order to refute a claimed excuse by another.

ernment had an opportunity to test petitioner's claim of duress by examining Wright. There is thus no foundation for petitioner's suggestion that duress cases "present no special burden" on the government. Pet. Br. 40.[15]

Moreover, while the defendant will presumably know whether he will raise a coercion defense, the defendant is generally under no obligation to notify the government before trial that the defense will be raised. The government will thus often have little, if any, opportunity to investigate the claim and to identify and locate witnesses capable of rebutting such a defense, much less *disproving* it beyond a reasonable doubt. Although, as petitioner notes (Pet. Br. 39-40), the government did have advance notice in this case, that was only because petitioner sought to introduce the testimony of an expert witness, and the district court therefore required her to give advance notice of that fact pursuant to Federal Rule of Criminal Procedure 12.2(b). See 8/6/2003 Pretrial Conf. Tr. 12-13; J.A. 18-20.[16]

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[15] In addition, in many cases, "those to whom the defendant refers either cannot be located or are outside the United States and not subject to subpoena power." *Dominguez-Mestas*, 929 F.2d at 1384. For example, it is increasingly common for federal prosecutions to involve criminal activity with international ties and, in at least several recent cases, defendants have asserted that their alleged coercer was in a foreign country. See, *e.g.*, *Chavez* v. *United States*, petition for cert. pending, No. 05-9280 (filed Feb. 13, 2006) (defendant claims that he transported marijuana into the United States from Mexico because his father owed a debt to an alleged leader of a Mexican drug cartel, who had threatened to kill his father and other family members if the defendant did not transport the marijuana). A defendant may thus raise a duress defense with full knowledge that the witnesses who could refute it are beyond the reach of the court's process.

[16] Notably, however, petitioner's counsel contended in the district court (J.A. 18-20; 8/6/2003 Pretrial Conf. Tr. 4-5) that Rule 12.2(b) did

Third, requiring the defendant to establish the defense of duress helps protect against spurious claims of duress. The Court recognized this in an analogous context involving a possible defense to the forfeiture of a vessel that ran the Union blockade of Confederate ports during the Civil War. See *The Diana*, 74 U.S. (7 Wall.) 354 (1869). The Court there observed that the situation "must be one of absolute and uncontrollable necessity," *id.* at 360: "Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretences of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose." *Id.* at 361. The potential for abuse that inheres in the duress defense, and that informed the development at common law of the strict standards governing its use, should also inform which party should shoulder the burden of proof of the defense.

Finally, the reasonable doubt standard, as applied to the duress defense, would overprotect defendants while jeopardizing important interests in punishing those who violate the law. "The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is * * * an increased risk that the guilty will go free." *Patterson*, 432 U.S. at 208. Although "our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits." *Ibid.* In the context of the duress defense, where the defendant has engaged in the acts that violate the criminal law with the requisite mental state but seeks to be excused from that violation,

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not apply to the expert evidence he intended to offer, which he asserted did not "relat[e] to a mental disease or defect or any other mental condition of the defendant." Fed. R. Crim. P. 12.2(b).

society should not have to bear the risk that the government may be unable to negate the excuse. District courts may allow the issue of duress to go to the jury even when the evidence on duress is extremely thin. See J.A. 290 (district court observing that "when it is a close call, better to give [the instruction] than not"). To protect against the very real risk that the guilty will thereby erroneously go free, the defendant, as the proponent of the defense, should bear the burden of persuading the jury that his criminal conduct should be excused.

This Court has recognized that pragmatic factors are properly taken into account in assessing where to place the burden of proving a particular defense. Thus, as this Court observed in *Patterson*: "[t]he placing of the burden of proof on the defense [of acting under extreme mental distress], with a lower threshold * * * is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the 'element' of mitigating circumstances is generally unfair." 432 U.S. at 212 n.13 (quoting with approval *People* v. *Patterson*, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C.J., concurring), aff'd, 432 U.S. 197 (1977)). See *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996) ("[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue."); *Morrison* v. *California*, 291 U.S. 82, 91 (1934) (observing that the burden of proof may properly be placed on the defendant if there exists "a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one

who is unable to bring himself within the range of an exception").[17]

2. Petitioner posits (Pet. Br. 31) only one practical consideration in support of her approach. She contends that placing the burden of proof on the defendant to establish the defense by a preponderance of the evidence creates "an unacceptable risk that a jury will be confused and thereby apply the wrong burden of proof when determining guilt." The creation of different burdens, she argues, will create a risk that the jury will find guilt solely because of the failure of a defense. This Court, however, has long rejected the notion that a jury is incapable of making just such distinctions.

In *Leland* v. *Oregon*, 343 U.S. 790 (1952), the Court easily put aside concerns that instructions placing the burden on the defendant to establish his insanity defense would confuse the jury. "Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity

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[17] Petitioner asserts (Pet. Br. 39) that in *Tot* v. *United States*, 319 U.S. 463 (1943), this Court rejected disparity in convenience of proof and opportunity for knowledge as rationales for placing the burden of proof on the defendant. But *Tot* involved a statutory presumption of an element of an offense, and the Court found the presumption unconstitutional because there was no rational connection between the fact proved and the fact presumed. *Id.* at 467-468; *see Leland* v. *Oregon*, 343 U.S. 790, 799 (1952) (explaining *Tot*). In that very different context, the Court noted that the defendant's "better means of information, standing alone," did not justify creating such a presumption. *Tot*, 319 U.S. at 469. Significantly, however, the Court left open the possibility of such an "argument from convenience * * * where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." *Id.* at 469-470.

upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc." *Id.* at 800. The Court concluded that "to condemn the operation of this system here would be to condemn the system generally," and declined to do so. *Ibid.* Similarly, in *Martin*, the Court rejected a claim that an instruction that placed the burden on the defendant to prove self-defense by a preponderance of the evidence would create jury confusion: "We do not harbor [such] mistrust of the jury." 480 U.S. at 234-235 n.*.

**C. The "More Recent Common Law" Does Not Support Requiring The Government To Disprove A Claim of Duress**

Despite acknowledging that the common law historically placed the burden of proof on the defendant to prove duress (Pet. Br. 17-19), petitioner contends (Pet. Br. 15, 20-31) that "[t]he more recent common law" supports placing the burden on the government to disprove duress beyond a reasonable doubt. That is not so.

1. Petitioner principally relies on this Court's decision in *Davis* v. *United States*, 160 U.S. 469 (1895), in which the Court abandoned the common-law view with respect to the insanity defense, and fashioned a new rule for the federal courts that the government must prove a defendant's sanity beyond a reasonable doubt if the defendant produces sufficient evidence to place his sanity at issue. That case cannot bear the weight petitioner places upon it.

a. As petitioner acknowledges (Pet. Br. 22-23 & n.22), Congress has rejected *Davis* by statute, placing the burden on defendants to prove their insanity by

"clear and convincing" evidence. 18 U.S.C. 17(b).[18] While that action may not speak directly to the burden of proof for other affirmative defenses, it strongly counsels against using *Davis* to fashion general principles for other affirmative defenses and suggests that Congress's view on the appropriate allocation of the burden of proof is closer to that of the common law than to the position taken in *Davis*. That indication of congressional intent is highly significant because Congress has plenary authority to create affirmative defenses, *Oakland Cannabis*, 532 U.S. at 490, and Congress has never expressly adopted defenses that justify or excuse the commission of an otherwise unlawful act on the basis of duress or necessity, much less required the government to disprove such a defense beyond a reasonable doubt. See National Comm'n on Reform of Fed. Crim. Laws, *Study Draft of a New Federal Criminal Code* 38 (1970).[19] To

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[18] In response to the acquittal of John Hinckley for the attempted murder of President Ronald Reagan, Congress enacted the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. IV, 98 Stat. 2057, which provides that "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." 18 U.S.C. 17(b).

[19] On at least one occasion, Congress considered a bill that would have codified the duress defense, and nothing in that proposal would have shifted the burden of proof to the government. The initial version of a bill designed to revise the federal criminal code, S. 1, 94th Cong., 1st Sess. § 531 (1975), provided that "[i]t is an affirmative defense to a prosecution under any federal statute, other than a prosecution under Section 1601 (Murder), that the defendant engaged in the conduct charged because another person coerced him to do so by a clear threat of imminent and inescapable death or serious bodily injury to himself or any other person." The amended version of the bill, S. 1437, 95th Cong., 2d Sess. § 501 (1978), eliminated this section in favor of a general provision recognizing "an affirmative defense of * * * duress * * * [which] shall be determined by the courts of the United States

the extent that federal courts treat the duress defense as a background principle of the common law that is generally read into federal criminal statutes absent contrary indications of congressional intent, see *Oakland Cannabis*, 532 U.S. at 490-491; *Bailey*, 444 U.S. at 415-416 n.11, there is no foundation for overriding the common law's historical allocation of the burden of proof to the defendant.

Indeed, where Congress expressly creates an affirmative defense to criminal conduct, it is well-established that the defendant bears the burden of establishing that defense:

> By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the ele-

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according to the principles of the common law as they may be interpreted in the light of reason and experience." In that regard, the National Commission on Reform of Federal Criminal Laws proposed:

> *Duress as Affirmative Defense.*—Duress is an excuse for criminal conduct, not a justification. Since we are dealing with conduct which is, objectively considered, criminal, it seems quite appropriate to place the burden of proof on the defendant to establish an excuse. This is accomplished, under the proposal, by denominating duress an "affirmative defense". It is contemplated that affirmative defenses would require a defendant to present a preponderance of evidence to convincingly exculpate himself from responsibility for his proven acts. This would be unlike an ordinary defense, in which a defendant would be required merely to raise an issue, which the government must still prove beyond a reasonable doubt. The distinction here adopted is used in the New York Revised Penal Law of 1967 (§ 25.00).

1 National Comm'n on Reform of Fed. Crim. Laws, *Working Papers of the National Commission on Reform of Federal Criminal Laws* 278 (1970).

> ments of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up *and establish it*.

*McKelvey* v. *United States*, 260 U.S. 353, 357 (1922) (emphasis added). And several affirmative defenses established in Title 18 explicitly require the defendant to carry the burden of proof. See note 24, *infra*. It would be strange, to say the least, to place a greater burden on the government where, as here, a court infers the existence of an affirmative defense as the basis of background assumptions about congressional intent, and both the common-law origins of the defense and sound policy considerations counsel in favor of placing the burden of proof on the defendant.[20]

b. In any event, the reasoning of *Davis* does not aid petitioner. In *Davis*, the Court concluded that the elements of the charged murder included that the defendant could not have acted with the requisite mens rea,

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[20] Petitioner's reliance (Pet. Br. 22 & n.20) on this Court's approach to the entrapment defense provides no support for placing the burden of proof on the government in cases involving duress. Cf. *Jacobson* v. *United States*, 503 U.S. 540, 549 (1992) (upon a showing of inducement, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act"). Unlike in the entrapment context, where "Government agents * * * originate a criminal design" and there is a risk that an "innocent person[]" may commit a crime because "the Government has induced an individual to break the law," *id.* at 548-549, duress involves no conduct by the government that causes the commission of a criminal act. In addition, entrapment is a defense created by this Court, see *Sorrells* v. *United States*, 287 U.S. 435 (1932), and does not share with duress a common-law tradition in which the defendant bears the burden of proof.

including "malice aforethought," if he lacked "sufficient mind to comprehend the criminality or the right and wrong of such an act." 160 U.S. at 485. Given that conclusion, the Court rejected the government's reliance on a presumption of sanity to satisfy its burden of proof, where the evidence called that presumption into question. *Id.* at 488.

Whatever the merits of the reasoning in *Davis* with respect to the elements of the murder charge there or the insanity defense as understood by the Court in 1895, its reasoning does not apply with respect to the defense of duress. A common-law claim of duress does not call into question any presumption relied upon by the government (as there is none) nor does it suggest that the defendant lacked the capacity to form the requisite mens rea for murder, or any other offense.[21] That the duress defense does not negate mens rea is demonstrated by the unavailability of the defense at common law for the intentional killing of an innocent third person. See Burdick, *supra*, § 199, at 262; 2 LaFave, *supra*, § 9.7, at 72. "If duress negatived state of mind, there would be no rule that intentional killings cannot be excused by duress * * * for the threat of harm would negative the defendant's capacity to intend death and so constitute a defense to murder of the intent-to-kill sort." *Id.* at 73 n.5.

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[21] The Court in subsequent cases has made it clear that the States and Congress have substantial latitude to adjust the insanity defense and the burdens for establishing it. See pp. 38-41, *infra*. In the same way, Congress presumably could eliminate the duress defense entirely, shift the burden to the government, or otherwise determine that it is related to the elements of a particular crime. The relevant point is simply that the factors that led this Court to deviate from the common-law rule in *Davis* are inapplicable to the common-law defense of duress.

In *Bailey*, the Court understood the duress defense to excuse criminal conduct "*even though* the necessary *mens rea* was present." 444 U.S. at 402 (emphasis added). Although the Court left open the theoretical possibility that a "heightened *mens rea*" requirement "might be negated by [a] defense of duress or coercion," *id.* at 415-416 n.11, it recognized that the duress defense did not negate the mens rea requirement that applied to the federal statute of escape at issue in that case: "knowingly" exceeding the bounds of confinement without authorization, *id.* at 408. And the Court further recognized that "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." *Ibid.*[22]

Indeed, duress would not negate mens rea regardless of whether the required culpability was willfulness, purpose, knowledge, recklessness, or negligence. See *Bailey*, 444 U.S. at 404 (listing commonly identified levels of mens rea). Petitioner's suggestion (Pet. Br. 15, 21-24) to the contrary "confuses the notions of objective and motive." *Walker* v. *Endell*, 850 F.2d 470, 473 (9th Cir. 1987), cert. denied, 488 U.S. 926 and 981 (1988). As

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[22] Although *Bailey* did not squarely address the burden of persuasion issue, it has language pointing toward placing the burden on the defendant rather than the government. *Bailey* repeatedly referred to the duress defense as an "affirmative defense," 444 U.S. at 416, and in concluding that the defendants there had failed to adduce sufficient evidence to warrant a jury instruction on the defense, *Bailey* held that to be entitled to an instruction, a defendant must produce sufficient evidence "as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense." *Id.* at 415; see *id.* at 425-426 (Blackmun, J., joined by Brennan, J., dissenting) (agreeing that "[c]ircumstances that compel or coerce a person to commit an offense, * * * traditionally have been treated as an affirmative defense, with the burden of proof on the defendant").

one court has explained, criminal statutes generally "prohibit particular action undertaken with a particular objective. * * * But the reason that the defendant has this objective involves the separate issue of motive." *Ibid.* If the reason or motivation for a defendant's conduct rises to the level of duress, society excuses his conduct, but that reason or motivation does not alter the fact that the defendant acted with the requisite mens rea. See *ibid.*

This point is illustrated by petitioner's case. The mens rea element under Section 922(a)(6) requires that petitioner acted "knowingly," that is, that she had knowledge of the facts that constituted the offense. See, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). As *Bailey* recognized, 444 U.S. at 415-416 n.11, even if petitioner were forced to commit illegal acts, that would not alter her knowledge of the facts (*e.g.*, the falsity of her statements to the gun dealers, see J.A. 221-222) that constituted the Section 922(a)(6) offense. Section 922(n) requires the government to prove the heightened mens rea of "willfulness"—*i.e.*, that petitioner acted with knowledge that her conduct was unlawful, see *Bryan*, 524 U.S. at 191-193—but a claim of duress does not negate that heightened level of intent. Plainly, a person can be coerced into taking an action that she nonetheless knows is unlawful. Indeed, that is precisely what petitioner claims happened here: she readily admitted that she knew at the time that she purchased the firearms that her conduct was unlawful, see J.A. 222, 239, but she claims she was forced to engage in it.[2]

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[2] The willfulness requirement of the Section 922(n) offense derives from the catchall provision of Section 924(a)(1)(D), which requires that the violation of certain provisions of Section 922, including Section 922(n), be committed "willfully." See 18 U.S.C. 924(a)(1)(D). On the

Lower courts have recognized this distinction between mens rea and motivation. In *United States* v. *Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999), cert. denied, 530 U.S. 1206 (2000), the court rejected the contention that the defense of duress negated the mens rea required by the offense of attempting to transport undocumented aliens, which required proof that the defendant "knew that the alien was illegal and intended to further the alien's illegal presence in the United States." *Id.* at 1158. The court explained that the defendant "could intend to drive a truck with undocumented aliens to further their illegal presence in the United States, but act in that manner because someone had a gun to his head." *Ibid.* Similarly, the Sixth Circuit reasoned in *United States* v. *Brown*, 367 F.3d 549, 556 (2004), with respect to the felon-in-possession offense, that "[p]roving necessity does not necessarily undercut the element of 'knowing possession;' one can knowingly possess a firearm but still do so under circumstances of necessity that justify an otherwise illegal act." See *United States* v. *Fei Lin*, 139 F.3d 1303, 1307 (9th Cir.) (duress does not negate the specific intent necessary to establish

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Section 922(n) count, the district court instructed the jury that petitioner had to receive a firearm "knowingly" (rather than "willfully") while under indictment. J.A. 310. Petitioner did not object to this instruction in the district court, see J.A. 287-303, or at any other time. See Pet. Br. 13 (stating that a Section 922(n) "requires a showing that she 'willfully' violated a prohibition on the receipt of a firearm by a person under indictment," but raising no issue with respect to the jury instruction). This failure to object is not surprising, and even if it had been raised on appeal, any claim of error could not satisfy the applicable plain-error standard, given petitioner's express admission at trial (J.A. 222, 239) that she knew at the time that she purchased each firearm that she was violating the law in doing so. See *Johnson* v. *United States*, 520 U.S. 461, 470 (1997).

the offenses of hostage taking (18 U.S.C. 1203) and making ransom demands (18 U.S.C. 875(a)), supplemented by 141 F.3d 1180 (9th Cir.) (Table), cert. denied, 525 U.S. 904 (1998); *Dominguez-Mestas*, 929 F.2d at 1382 ("[Defendant] admits that he knowingly brought heroin into the United States. Whether he was forced to do so does not negate his criminal knowledge."); *Walker*, 850 F.2d at 473 (noting with respect to a state offense for kidnapping: "a defendant can restrain another with the intent to inflict injury, in the sense that he knows that his actions will lead to injury or that his purpose is to cause injury, but act in this manner in order to comply with the demands of another").

2. As these cases suggest, petitioner's proposed rule of practice cannot be justified by any purported trend (Pet. Br. 25-34) in the lower federal courts. As an initial matter, to the extent that the cases on which she relies merely followed *Davis*—which this Court has recognized "had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses," *Patterson*, 432 U.S. at 202—they are of questionable value, especially in the duress context, for the reasons discussed above. This is particularly true to the extent that those cases reflect rules adopted in the wake of *Davis* but before this Court clarified in *Leland* that *Davis* did not prescribe a constitutional mandate. *Id.* at 203 ("*Davis* was not a constitutional ruling * * * as *Leland* v. *Oregon*, *supra*, made clear."); *Leland*, 343 U.S. at 797.[24]

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[24] The Model Penal Code, upon which petitioner relies (Pet. Br. 25-26 & n.26), not surprisingly reflects the trend that occurred in the wake of *Davis*. Of course, Congress has not enacted into law the Model Penal Code's suggestion with respect to the burden of persuasion of the duress defense. Cf. Model Penal Code § 2.09 comment at 377 (1985)

Moreover, if anything, the "more recent common law" in the federal courts has trended toward an approach that places the burden of persuasion of the defense of duress on the defendant. As petitioner acknowledges (Pet. Br. 34-41), cases in the Fifth, Ninth, and Eleventh Circuits have placed the burden of persuasion on the defendant. See, *e.g.*, J.A. 332 (5th Cir.); *Fei Lin*, 139 F.3d at 1307-1308 (9th Cir.); *United States* v. *Deleveaux*, 205 F.3d 1292, 1298-1301 (11th Cir.), cert. denied, 530 U.S. 1264 (2000). The Sixth Circuit has also done so. See *Brown*, 367 F.3d at 555-556.[25] In addition, the Third Circuit has placed the burden of persuasion on the defendant in the context of a virtually identical justification defense, where the defense did not negate the mens rea element of the charged crime. See *United States* v. *Dodd*, 225 F.3d 340, 347-350 (2000), cert. de-

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(observing that its approach with respect to the requirements of the duress defense is "plainly more liberal toward the victims of coercion than traditional law"). And, indeed, Congress has moved in the opposite direction in the specific context that gave rise to *Davis* by making clear that the burden to establish an insanity defense rests with the defendant and the defendant must establish the defense by clear and convincing evidence. See 18 U.S.C. 17(b); see also 18 U.S.C. 373(b) (establishing burden on defendant to prove affirmative defense by a preponderance of the evidence); 18 U.S.C. 1512(c) (Supp. II 2002) (same); 18 U.S.C. 2320(e) (same).

[25] The Sixth Circuit does have dicta in cases looking the other way. See *United States* v. *Campbell*, 675 F.2d 815, 821 (6th Cir.) (stating in dicta that government would bear burden of persuasion of duress defense), cert. denied, 459 U.S. 850 (1982); *United States* v. *Rifle*, 28 F.3d 565, 568 n.2 (6th Cir. 1994) (setting forth a pattern instruction on duress and coercion that placed the burden of persuasion on the government but not addressing its propriety).

nied, 532 U.S. 959 (2001).[26] Similarly, although the Tenth Circuit has case law suggesting that the government bears the burden of persuasion of a duress defense, see *United States* v. *Scott*, 901 F.2d 871, 873 (1990); *United States* v. *Falcon*, 766 F.2d 1469, 1477 (1985), it more recently has held that the defendant should bear that burden of persuasion of a necessity defense where the defense does not negate the mens rea element of the charged offense and the defendant is more likely to have better access to the relevant evidence. See *United States* v. *Unser*, 165 F.3d at 764-765 (involving strict liability offense).[27] Although the reasoning of these cases suggests the possibility that a duress defense might negate the intent element of some crime, and Congress, in theory, could create such an

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[26] Although, as petitioner notes (Pet. Br. 38 n.48), *Dodd* purported to limit its decision to the defense of "justification," as opposed to "duress or coercion," 225 F.3d at 348 n.6, the requirements of the Third Circuit justification defense it was addressing, see *id.* at 342, are virtually identical to the requirements of the duress defense as formulated by the Fifth Circuit, see J.A. 328. Moreover, the court's reasons for placing the burden on the defendant—including that the defense of justification did not negate an element of the offense, that the relevant evidence is "more easily accessible to the defendant," and that the common law placed the burden on the defendant, see *Dodd*, 225 F.3d at 346-350—apply equally to the defense of duress.

[27] The law in the First Circuit is "unsettled." *United States* v. *Diaz*, 285 F.3d 92, 97 (1st Cir. 2002). Compare *id.* at 96 (upholding, against challenge of plain error, a jury instruction placing the burden of proof on the defendant) with *United States* v. *Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996) (upholding, on plain error review, refusal to instruct on duress defense, but indicating that government bears the burden of proof on duress when an instruction is warranted); *United States* v. *Amparo*, 961 F.2d 288, 291-292 (1st Cir.) (rejecting sufficiency of the evidence challenge and indicating the government bears the burden of proof on duress defense), cert. denied, 506 U.S. 878 (1992).

element, under a proper application of such an approach (see pp. 30-34, *supra*), it is unlikely that a duress defense ever will negate any of the traditionally used mens rea requirements.[28]

Of the circuits that have addressed the issue,[29] this leaves the Second, Seventh, and Eighth. The two Second Circuit decisions to which petitioner points (Pet. Br. 27-28 & n.31), did not need to definitively resolve the burden-of-persuasion issue. See *United States* v. *Mitchell*, 725 F.2d 832, 836-837 (2d Cir. 1983) (holding that defendant was not entitled to any instruction); *United States* v. *Smith*, 160 F.3d 117, 123 (2d Cir. 1998) (holding, while not taking a position on which party bears the burden of persuasion, that Federal Rule of Criminal Procedure 11(f) did not require district court to reopen its inquiry into the factual basis for defendant's guilty plea to explore a possible defense of justification, in part because the defense does not negate the elements of an offense). The Eighth Circuit cases on which petitioner relies (Pet. Br. 27 n.29) contain no analysis in support of petitioner's proposed rule. See *United States* v. *Campbell*, 609 F.2d 922, 925 (8th Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Norton*, 846 F.2d 521, 524-525 (8th Cir. 1988). Finally, petitioner relies (Pet. Br. 29-30 & n.34) on the Seventh Circuit, which has held that a court has no power to allocate the burden of persuasion to the defendant absent a statute so doing. See

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[28] In addition, in apparently the only published Fourth Circuit decision to address the issue, that court upheld, on plain-error review, an instruction that placed the burden of proof on duress on the defendant, even though the court suggested a belief that the defense might negate the intent element of the offense charged in that case. See *United States* v. *Carrier*, 344 F.2d 42, 46-47 (4th Cir. 1965).

[29] The D.C. Circuit does not appear to have addressed the issue.

*United States* v. *Talbott*, 78 F.3d 1183, 1185 (1996) (per curiam). Every court to consider *Talbott*'s reasoning, however, has correctly rejected it. See *United States* v. *Beasley*, 346 F.3d 930, 934 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004); *Dodd*, 225 F.3d at 344-345; *Deleveaux*, 205 F.3d at 1299-1300; see also *United States* v. *Hartsock*, 347 F.3d 1, 9 & n.10 (1st Cir. 2003) (declining to apply *Talbott*). When an affirmative defense is read into a statute as a reflection of background understandings of congressional intent, "it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed." *Dodd*, 225 F.3d at 345.[30]

**D. Placing The Burden On The Defendant To Establish Duress By A Preponderance Of The Evidence Does Not Violate The Due Process Clause**

Near the end of her brief (Pet. Br. 41-45), petitioner argues that placing the burden on her to prove her affirmative defense of duress by a preponderance of the evidence would violate the Due Process Clause. As petitioner implicitly acknowledges, that argument is contrary to well-settled law. See, *e.g.*, *id.* at 45 ("[T]he reasoning of *Martin* v. *Ohio* cannot stand."); *id.* at 44 n.51 (relying on the dissenting opinions in *Leland* and *Martin*).

1. In a series of cases dealing with the issue of affirmative defenses, this Court has made clear that placing

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[30] In addition, petitioner makes too much of the States' various practices. See Pet. Br. 32-33 & n.38. Even by petitioner's count, a significant number of States (fourteen) place the burden of persuasion of the defense of duress on the defendant. This number demonstrates that there is nothing inherent in the defense of duress that should require the prosecution to bear the burden of its negation, either as a matter of federal common law or under the Due Process Clause.

the burden on a criminal defendant to establish an affirmative defense does not violate the Due Process Clauses of the Fifth or Fourteenth Amendment. In *Leland*, the Court upheld, against a due process challenge by a defendant on trial for first-degree murder, a state statute requiring a defendant pleading insanity to establish the defense beyond a reasonable doubt. 343 U.S. at 792-793, 799. The Court upheld that statute even though Oregon was the only state imposing a beyond-a-reasonable-doubt standard on the defendant. *Id.* at 798. In so ruling, the Court clarified that *Davis* was deviating from the common law and was not a constitutional ruling. *Id.* at 797.

Subsequently, in *Patterson*, 432 U.S. at 204-205, the Court made clear that the rule established in *Leland* survived its decision in *In re Winship*, 397 U.S. 358 (1970), which accorded due process protection to the longstanding common-law rule that prohibited a defendant's conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364 (rejecting claim that "*Leland* had been overruled by *Winship*"). In *Patterson*, the Court upheld the constitutionality of requiring a defendant charged with second-degree murder—which was defined as the intentional killing of another person—to prove the affirmative defense of extreme emotional disturbance, which reduced the crime to manslaughter. 432 U.S. at 198, 206-207. The Court explained that the statutory scheme was comparable to that upheld in *Leland*, whereby "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless dem-

onstrated by a preponderance of the evidence." *Id.* at 206. The Court found that the affirmative defense of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder," but rather "constitutes a separate issue on which the defendant is required to carry the burden of persuasion." *Id.* at 206-207.

The Court noted that it would be unwise to require a State to establish beyond a reasonable doubt "every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability." *Patterson*, 432 U.S. at 207. The Court explained that, if it were so, a State might be unwilling to liberalize its laws, and afford affirmative exculpatory or mitigating defenses to conduct that would otherwise be criminal, for fear that too many offenders would escape just punishment. *Ibid.* The Court observed that New York's new code of criminal conduct contained "some 25 affirmative defenses which either exculpate or mitigate but which must be established by the defendant to be operative." *Ibid.* "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." *Id.* at 207-208.

The Court thus declined to "adopt as a constitutional imperative" a requirement that a State "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Patterson*, 432 U.S. at 210. As the Court explained:

> We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required.

*Ibid.*[31]

The Court expressly reaffirmed *Patterson* and *Leland* in *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987). In *Martin*, the Court held that placing the burden on a defendant charged with aggravated murder to prove the affirmative defense of self-defense by a preponderance of the evidence did not violate due process. The Court was "not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former." *Id.* at 234. See *Gilmore* v. *Taylor*, 508 U.S. 333, 341 (1993) ("States must prove guilt beyond a reasonable doubt with respect to every element of the

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[31] In so doing, *Patterson* distinguished and limited (see 432 U.S. at 214-215 & n.15) the Court's earlier decision in *Mullaney*, *supra*, which held unconstitutional a Maine statute requiring a defendant charged with murder to rebut a presumption of malice and prove that he acted "in the heat of passion on sudden provocation" in order to reduce the murder charge to manslaughter. As *Patterson* explained, *Mullaney* held only that a State that chooses to define a particular fact as an element of an offense must prove every ingredient of the offense beyond a reasonable doubt and "may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U.S. at 215; see *Jones* v. *United States*, 526 U.S. 227, 241 (1999) ("[In *Mullaney*] [w]e identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law.").

offense charged, but * * * they may place on defendants the burden of proving affirmative defenses.").

2. Petitioner asserts that placing the burden of persuasion of duress on the defendant violates due process because "the duress defense traverses a fundamental component of *mens rea*, freedom of choice." Pet. Br. 45. This misperceives the pertinent inquiry under *In re Winship*, *supra*. This Court "has never articulated a general constitutional doctrine of *mens rea*." *Powell* v. *Texas*, 392 U.S. 514, 535 (1968) (plurality). Rather, the *Winship* line of cases requires the government to prove the elements of the crime, including the mens rea element, as defined by the legislature and interpreted by the courts. See, *e.g.*, *Martin*, 480 U.S. at 231-232, 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982). As the Court observed in *Patterson*, "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case." 432 U.S. at 211 n.12; see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.").[32]

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[32] Nothing in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny alters the analysis employed by the Court in its affirmative defense line of cases. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. That

Indeed, petitioner's argument (Pet. Br. 42) that duress negates the mens rea element of all criminal offenses, because one who acts "without a free choice" cannot be guilty of a crime, is merely a variant of one rejected by the Court in *Martin*. There, the defendant argued that because "self-defense renders lawful what would otherwise be a crime," and because "unlawfulness" and "'criminal' intent" were both essential for conviction, the government had to disprove self-defense to prove the elements of its case. 480 U.S. at 235. In rejecting this argument, the Court measured the government's burden by the elements of the crime as defined by state law, reasoning that the "unlawfulness" for which the government bore the burden of proof was "conduct satisfying the elements of aggravated murder," and that the "'criminal' intent" for which the government bore the burden was the "mental state" for aggravated murder as defined by state law. *Ibid.*

The argument that duress negates a fundamental component of mens rea is particularly misplaced because the criminal law has always recognized that a showing of duress does not refute the existence of the "voluntary"

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holding "leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt * * * the legislation creating the offense can place the burden of proving affirmative defenses on the defendant." *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.) (citations omitted), cert. denied, 537 U.S. 829 (2002). As it had in *Patterson*, the Court in *Apprendi* cautioned that there was a limit to a legislature's ability to reallocate burdens of proof "by placing the affirmative defense label on 'at least some elements' of traditional crimes." 530 U.S. at 475 (quoting *Patterson*, 432 U.S. at 210). But the Court has made clear that such limit is "easily satisfied" when "'at common law the burden of proving' the mitigating circumstances * * * 'rested on the defendant.'" *Jones*, 526 U.S. at 240.

act that is traditionally required for criminal liability. 1 LaFave, *supra*, § 6.1(c) at 425-426. A defendant who is unconscious or asleep during an alleged crime does not act voluntarily, nor does a defendant who is physically forced into bodily movement and thereby strikes another person. *Id.* at 427. But that view of voluntariness has never extended to "the situation where A by threats, rather than by physical force, causes B to strike C." *Id.* at 428 n.33. As one commentator has explained, "[i]n such a case, B has engaged in a 'voluntary act', in the sense in which that term is used [in the criminal law], even though he would not have so acted but for A's threats." *Ibid.*; see Dressler, 62 S. Cal. L. Rev. at 1360 ("His act may be unwilling, but it is not unwilled."). The commentator concludes that "B may, however, be able to assert the defense of duress." 1 LaFave, *supra*, § 6.1(c) at 428 n.33. There is, therefore, no inconsistency between the general requirement that the government must prove a voluntary act to establish an offense and a requirement that the defendant prove duress to establish a defense.[33]

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[33] Although in some legal contexts, the concepts of voluntary action and coercion are opposite sides of the same coin, see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), the law of extortion similarly presupposes that voluntary action can be induced by threats. For example, the Hobbs Act, 18 U.S.C. 1951, defines extortion to "mean[] the obtaining of property from another, *with his consent*, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2) (emphasis added). The same Act defines "robbery" to mean the "unlawful taking or obtaining of property from the person or in the presence of another, *against his will*, by means of actual or threatened force, or violence, or fear." 18 U.S.C. 1951(b)(1) (emphasis added). Although the "consent" in the extortion context is plainly coerced, it nonetheless is treated as the voluntary act of the victim, produced by unlawful pressure.

As the Court observed in *Patterson*, placing a burden of persuasion on the defendant in circumstances that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" could be subject to proscription under the Due Process Clause. 432 U.S. at 202 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). Allocating to the defendant the burden of proving the affirmative defense of duress, however, does not remotely run afoul of that limitation: the defendant is merely required, consistent with the common-law rule, to prove a separate issue, as to which he has superior access to the evidence. See *Martin*, 480 U.S. at 233-234. Indeed, because the "primary guide in determining whether the principle in question is fundamental is * * * historical practice," see *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality); *Medina* v. *California*, 505 U.S. 437, 446 (1992), the fact that the common law placed the burden of proving the affirmative defense of duress on the defendant soundly dispels any notion that such practice offends any fundamental principle of justice. Accordingly, the Constitution does not override the conclusion dictated by the common law and common sense: a defendant must bear the risk of nonpersuasion in establishing that she was subjected to duress that left her no reasonable legal alternative but to violate the criminal law.[34]

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[34] Petitioner contends (Pet. Br. 46) that, if the government bears the burden of persuasion of her claimed defense, the district court's contrary instruction to the jury was "structural error" requiring automatic reversal. That contention is without merit. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 501-503 (1987) (holding harmless-error review applicable to an instruction that erroneously informed the jury about the standard of proof of one of the elements of the crime where the jury was not precluded from considering the element). If the Court concludes that

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 2006

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the instruction here was erroneous, it should remand to the court of appeals to consider in the first instance whether the error was harmless. That would include consideration of whether petitioner was entitled to an instruction in the first place. As explained in our opposition to the petition for a writ of certiorari (Br. in Opp. 10-12), petitioner did not introduce sufficient evidence to warrant an instruction. See *Bailey*, 444 U.S. at 415.

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IN THE

# Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

*Petitioner.*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## ARGUMENT

Respondent's brief succeeds only in setting forth "arguments from convenience" in favor of imposing a burden of *production* on defendants who assert a duress defense. Respondent's further reliance upon those arguments to permit judge-made burden shifts, so that similarly situated defendants in some federal circuits will bear burdens that those in other circuits do not, collapses in the face of competing practical considerations, long-established and carefully reasoned common law, and constitutional concerns about the erosion of the reasonable doubt standard.

### I. RESPONDENT'S "SUBSTANTIAL PRACTICAL CONSIDERATIONS" DO NOT SUPPORT ITS POSITION

Respondent first maintains that "the defendant will usually be in a far better position than the government to adduce evidence on a purported duress defense." Resp. Br. 20. By its own terms, this assertion justifies no more than requiring defendants who claim duress to adduce evidence of it. The Court has previously rejected that rationale. "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much." *Tot* v. *United States*, 319 U.S. 463, 469 (1943).[1] Nor do Respondent's cited authorities support its position.

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[1] Respondent asserts that *Tot* is not applicable because it involved a statutory presumption of an element of the offense and not a burden shift. Resp. Br. 25 n.17. But the presumption addressed in the case - that the possession of a firearm was presumptive evidence that the firearm had been shipped, transported or received by the possessor - effectively shifted the burden of proof to the defendant.

In *Patterson* v. *New York*, 432 U.S. 197, 211 n.13 (1977), the Court addressed only a mitigating circumstance which would lessen the punishment for the offense. Duress, however, is a complete defense to a crime. If a defendant successfully asserts a duress defense, she is found not guilty of the crime. Similarly, *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996), did not involve the allocation of burdens attendant to the trial itself, but to the determination of competency to stand trial.[2] And in *Morrison* v. *California*, 291 U.S. 82, 91 (1934), the Court held that due process was violated when the state placed the burden of proving citizenship on a defendant charged with conspiring to violate the Alien Land Law. While the Court did state that the burden of proof could be shifted upon employing a balancing test and finding that shifting the burden will be "an aid to the accuser without subjecting the accused to hardship or oppression," it failed to find that test had been satisfied in that case. *Id.* at 89. If the difficulty in proving citizenship does not fit into the limited circumstances where the government can shift the burden based on convenience of proof, then certainly duress does not qualify either.

Respondent further argues that the "sole evidence of duress will be testimony offered by the defendant and close associates who have an incentive to protect the defendant." Resp. Br. 20. Yet there is absolutely nothing unique about the duress defense in this regard. The argument says little more

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[2] In *Cooper*, Oklahoma had placed the burden to prove competency on the defendant by clear and convincing evidence, while the majority of jurisdictions required the defendant to meet a preponderance of the evidence standard. The Court struck down this requirement, finding that the prosecution's interest in "prompt and orderly disposition of criminal cases" did not support imposing a higher burden of proof on the defendant. *Cooper*, 517 U.S. at 360. That Court did not in any way address Respondent's claim that "[t]he difficulty of ascertaining where the truth lies" would make it appropriate to place the burden of proof on the proponent of an issue. Resp. Br. 24 (*quoting Cooper*, 517 U.S. at 366).

than the prosecution should not bear the burden of proof because defense witnesses will lie to protect the defendant. Moreover, the premise is wholly contrary to the presumption of innocence, see *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) (assumption that the defendant has more knowledge of the facts than the government presumes that the defendant is guilty, contrary to the presumption of innocence), and promotes a highly cynical view of the jury's capacities. *United States* v. *Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector.") (internal quotations and citations omitted).

Second, Respondent contends, without authority, that "in most cases" prosecutors will not have access to the individual responsible for the coercion. Resp. Br. 21. That was not true in this case and, given the prosecution's resources, that is not necessarily true in other cases. Even if it were true, this "practical consideration" – and, all of Respondent's practical considerations - entirely ignores the District Court's function as a gatekeeper who can exclude evidence or refuse a jury instruction on a defense where the evidence is insufficient and uncorroborated. As the Court cautioned in *Bailey*, if "an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." *United States v. Bailey*, 444 U.S. 394, 416 (1980).[3]

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[3] Respondent's note that the Court's opinion in *Bailey* "has language pointing toward placing the burden on the defendant." Resp. Br. 31 n.22 points only to language that would support placing the burden of *production* on defendants claiming duress. The holding of *Bailey* was just that: "such evidence and testimony were lacking, and hence respondents were not entitled to any instruction on duress or necessity." *Bailey*, 444 U.S. at 395. The relevance of *Bailey* to this case is that the Court there highlighted the power of the District Courts to exclude evidence of specious claims of duress.

The absence of authority to support Respondents' claim of a general lack of access to the alleged abuser is also telling. Most criminal cases in the federal courts involve multiple defendants. Prosecutors have extensive powers beyond granting immunity to make charging decisions, to reach plea agreements and offer downward departures for substantial assistance pursuant to the Sentencing Guidelines (see USSG § 5K.1), in order to gain access to a witness who is close to the defendant and the facts of the case, and who will provide testimony on behalf of the prosecution. While Respondent decries the prospect of granting immunity to one with equal or greater culpability for the charged crime (see Resp. Br. 21 n.14), the fact of the matter is that immunity is relatively rare, whereas the use of charging discretion, plea agreements and § 5K.1 departures are the "bread and butter" of federal criminal prosecutions. Respondent's speculation about a lack of access in "most cases" therefore has little merit.

Respondent further complains that the defendant should have the burden of proof on a duress defense because he or she "is generally under no obligation to notify the government before trial that the defense will be raised." Resp. Br. 22. Yet a duress case is no different than any other case where the defendant simply pleads not guilty to the indictment or raises a defense. A defendant has no obligation to give the prosecution notice of the defense of self-defense, entrapment or other statutory defenses. Just as the prosecution is under no duty to inform a defendant of all of its evidence prior to trial, the accused is under no duty to provide notice of its duress defense.

In any event, all criminal defendants must satisfy the reciprocal discovery obligations of Fed. R. Crim. P. 16. Most federal courts will require both the prosecution and the defense to provide a list of witnesses prior to trial and designate whether the witness will provide factual or expert testimony. E.g., D.C.D.C. LCvR 16.5(b)(5). Many courts will require the defendant to give a brief statement of the

subject matter of the expert's testimony, if for some reason pretrial notice was not otherwise provided. *Id.* Further, a defendant who claims duress must provide notice of her intention to introduce expert testimony relating to a mental disease, defect or other mental condition. Fed. R. Crim. P. 12.2(b). In that case, as here, the court may order the defendant to submit to an examination by an expert hired by the government, which is precisely what happened in this case. In the situation where the prosecution really has no indication that duress will be raised, the prosecution retains the power to call rebuttal witnesses to refute the duress defense. Thus, there are already safeguards in place to protect against the lack of notice.

Third, Respondent argues that "requiring the defendant to establish the defense of duress helps protect against spurious claims of duress." Resp. Br. 23. The same could be said of the defense of self-defense or entrapment, about which there is no question where the burden of proof lies. *Jacobson* v. *United States*, 503 U.S. 540 (1992); *United States* v. *Alvarez*, 755 F.2d 830, 842 (11th Cir. 1985) (it has become "a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government"). There is simply no more potential for the abuse of the duress defense than there is for the abuse of self-defense, entrapment, accident, or the defense of being not guilty.

Fourth, Respondent argues that "the reasonable doubt standard, as applied to the duress defense, would overprotect defendants while jeopardizing important interests in punishing those who violate the law." Resp. Br. 23. The vast majority of circuits and States that have addressed the issue and placed the burden to prove the absence of duress on the prosecution beyond a reasonable doubt plainly disagree with the Respondent's contention. Nor has Congress stepped in to

address a rash of acquittals occasioned by the successful deployment of the duress defense.

In further support of its claim that the reasonable doubt standard overprotects defendants, Respondent maintains that "courts may allow the issue of duress to go to the jury even when the evidence on duress is extremely thin." Resp. Br. 24. Respondent, however, has no basis for such a concern. The defendant has the burden of producing evidence in support of each element of the defense of duress. As in any other case, the trial court will act as "gatekeeper" in determining whether the defense evidence is sufficient to go to the jury.[4] Thus, if the defendant has not met her burden, the judge will not give the jury an instruction on the duress defense. Shifting the burden of persuasion to the defendant does not aid Respondent because ultimately it is the judge who will decide whether there is enough evidence to go to the jury. That determination will not change based on which party bears the burden of persuasion. Therefore, the prospect of "extremely thin" evidence does not warrant placing the burden of persuasion on the defendant.

Respondent contends that the "one" practical consideration offered by Petitioner has been rejected by the Court. Resp. Br. 25-26 (citing *Martin* v. *Ohio*, 480 U.S. 228 (1987) and *Leland* v. *Oregon*, 343 U.S. 790 (1952)). Justice White's

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[4] *United States* v. *Frazier*, 387 F.3d 1244, 1272 (11th Cir. 2004) *cert denied* 125 S.Ct. 2516 (2005) ("[T]he trial judge's role as gatekeeper is designed to ensure that the jury, in carrying out its prescribed role, bases its determinations on relevant and reliable evidence, rather than on speculation or otherwise unreliable conjecture. These bedrock principles establish that, while a criminal defendant must be given every meaningful opportunity to present a complete defense, in doing so he must comply with the procedural and evidentiary rules designed to facilitate a search for the truth."); *see also United States* v. *Talbott*, 78 F.3d 1183, 1188 (7th Cir. 1996) ("[I]t is entirely appropriate to let the judge serve as gatekeeper for affirmative defenses (for when there is no material dispute the judge may decline the defendant's request for an instruction")).

opinion in *Martin* only addressed the issue in a brief footnote responding to the dissent, 480 U.S. at 234 n.*. and Justice Clark's opinion in *Leland* only emphasized the jury's ability to separate guilt and innocence determinations from criminal responsibility and legal insanity. 343 U.S. 790 at 800. To the extent that either opinion can be read to reject the types of claims Petitioner has made here with respect to logical contradictions in the jury's instructions (Pet. Br. 47), those opinions have been called into question by subsequent decisions of this Court, see *Jackson* v. *Denno*, 378 U.S. 368 (1964) (finding juror confusion in separating issue of voluntariness of confession from guilt),[5] and certainly have not been followed by the circuit courts of appeals that analyzed the issue with care. E.g., *United States* v. *Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983) (finding a "grave possibility of juror confusion" if defendant bears burden on duress defense by a preponderance of the evidence).

There exists another, more pernicious practical result that follows from burden-shifting. In any litigation, shifting the burden of proof inevitably invites the party without the burden to attack the credibility of the party bearing the burden as the simplest and easiest means of calling into question the evidence offered. Criminal defendants, however, are unlike any other witnesses with respect to credibility issues. That they are the subject of a charge by the United States of America strongly prejudices potential jurors, even before evidence is heard. Even cooperating witnesses who have already been charged are not similarly situated because they are sponsored by the prosecution. One of Respondent's own authorities amply illustrates a criminal defendant's peculiarly vulnerable position in this regard: "If the doctrine [of duress]

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[5] In dissent, Justice Harlan compared the complexity of the issues in *Leland* and *Jackson* and found that issues in *Leland* were equally, if not more complex, than those in *Jackson*. *Jackson*, 378 U.S. at 432-37 (Harlan, J. dissenting). Thus, Justice Harlan found the ruling in *Jackson* to be a departure from the *Leland* ruling. *Id.*

was not to be the plaything of the shrewd and unscrupulous (*and were not those suspected of crimes already questionable in that respect?*) it had to be well-hedged and strict of proof." L. Newman & L. Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957) (emphasis added). And, as Respondent further notes, "the sole evidence of duress [often] will be testimony offered by the defendant and close associates" thereby exacerbating credibility disparity. Resp. Br. 20. Nor does the presumption of innocence help in this regard because the obvious effect of shifting the burden of persuasion is to remove that presumption on this issue.

Petitioner's case is a good example. The prosecution's focus shifted to character assassination, not proof of guilt. Thus, in addition to proving the elements of duress, Petitioner had to prove her credibility. In final argument, the prosecutor stressed Petitioner's burden to prove by a preponderance of the evidence that she was under duress by convincing the jury that she was telling the truth. SF, pp. 792-796. The prosecutor spent all of her rebuttal time arguing that Petitioner was lying. She started by saying that "to allow Ms. Dixon to be excused from her criminal conduct by her claim of duress, first and foremost, you have to believe her." SF, p. 806. The prosecutor then reiterated how many times Petitioner lied on the ATF 4473 forms. The prosecutor continued her character attack by pointing out the completely unrelated admission by Petitioner that she misrepresented where she lived in order to enroll her children in school. The prosecutor concluded her rebuttal by telling the jury that they "had been fed a pack of lies." SF, p. 811. The prosecution never contended that Petitioner and her children were not abused by her ex-husband, Ted Dixon, nor by Thomas Earl Wright, Jr. Instead, the prosecution's strategy was to shift the burden to the Petitioner to prove her character, and thereby shift the burden to her to prove that she was not guilty.

More than just practical considerations support Petitioner's position. As a matter of fairness, similarly situated defendants should not be treated differently. The stark reality is that if Petitioner had acquired one of her abuser's guns and shot him with it, no burden would have shifted to her to demonstrate to the jury by a preponderance of evidence that she had acted in self-defense. Yet the defenses of self-defense and duress are not meaningfully different.[6] Self-defense, like duress, is often referred to as an affirmative defense.[7] A person is entitled to use force when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force.[8] The elements of duress are an immediate threat of death or serious bodily injury, a well-grounded fear that the

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[6] *See United States* v. *Clavette*, 135 F.3d 1308 (9th Cir. 1998), where the defendant was charged with killing a grizzly bear and contended that he acted in self-defense. The opinion in that case reflects that the defendant was convicted based on the physical facts of the case, the inconsistent testimony of the defendant's wife who was a witness to the killing, and the testimony of the defendant himself. In that case, the government disproved self-defense beyond a reasonable doubt to the satisfaction of the jury. Certainly the grizzly bear was no help to the prosecution's case.

[7] *United States* v. *Branch*, 91 F.3d 699, 714 n.1 (5th Cir. 1996); *United States* v. *Alvarez*, 755 F.2d 830, 842 n.12 (11th Cir.) *cert. denied* 474 U.S. 905 (1985); *United States* v. *Corrigan*, 548 F.2d 879, 881 (10th Cir. 1977); *United States* v. *Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996); Model Penal Code § 1.12, Comment 3 (1962).

[8] A person acting in self-defense must use no more force than appears reasonably necessary under all of the circumstances. Force that is likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary in order to prevent death or great bodily harm. O'Malley, Grenig, & Lee, *Federal Jury Practice and Instructions, Criminal*, § 45.19 (2004); LaFave & Scott, *Substantive Criminal Law*, § 5.7 (1986); 2 Robinson, *Criminal Law Defenses*, Chapter 3 C (1984). One who is the aggressor is not entitled to an instruction on self-defense. *United States* v. *Wagner*, 834 F.2d 1474, 1486 (9th Cir. 1987).

threat will be carried out, and no reasonable opportunity to avoid the threatened harm.[9] Thus, the essence of duress and self-defense are the same, that is, an unlawful threat of imminent death or serious bodily injury which causes the actor to engage in conduct that, but for the imminent threat, would violate the criminal law. Proof that the conduct results from the imminent threat demonstrates that the defendant did not have the "evil mind" or "vicious will" that is necessary for criminal liability.

Although self-defense and duress are essentially the same, they are not treated the same. In all federal circuits, including the Fifth Circuit, judges instruct juries in self-defense cases that the prosecution must disprove self-defense beyond a reasonable doubt and a self-defense-negation is included as part of the elements of the offense. O'Malley, Grenig & Lee, *supra*; *United States* v. *Branch*, 91 F.3d 699, 714 n.1 (5th Cir. 1996). As Petitioner engaged in the less blameworthy conduct of purchasing firearms, and in her mind, keeping her children safe, rather than taking a life, she was required to prove her defense by a preponderance of the evidence. Such discrepancies were criticized by the drafters of the Model Penal Code. The Comments to the Model Penal Code explain that "as to all these claims for exoneration their truth goes in final analysis to the guilt,- to the rightness of punishing the accused. Thus, it seems inconsistent to demand as to some

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[9] *United States* v. *Toney*, 27 F.3d 1245, 1248 (7th Cir. 1994); *United States* v. *Santos*, 932 F.2d 244, 249 (3d Cir. 1991); *United States* v. *Hernandez-Franco*, 189 F.3d 1151, 1157 n.3 (9th Cir. 1999); *United States* v. *Scott*, 901 F.2d 871, 873 (10th Cir. 1990) In the Fifth Circuit Pattern Jury Instructions the defense is entitled "Justification, Duress, or Coercion," and adds two additional requirements: that the defendant had not recklessly or negligently placed himself in a situation where it was probable he would be forced to choose the criminal conduct, and that a reasonable person would believe that by committing the criminal act he would directly avoid the threatened harm. § 1.36 Fifth Circuit Pattern Jury Instructions, Criminal (2001). This was the source of the jury instructions in Petitioner's case.

elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress . . . the jury may convict though they have such doubt." Model Penal Code, § 1.12, Comment 5 (Final Draft 1962), quoting C. McCormick, *Handbook of the Law of Evidence* § 321, at 684 (1964).

The entrapment defense also bears a striking resemblance to duress. To make out an entrapment defense, the defendant must come forth with evidence that demonstrates that the police officers "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932). In other words, the defendant must prove that law enforcement induced commission of the crime. Like duress, the issue in the entrapment defense is the blameworthiness of the defendant. Both defenses contend that the actor's will was overborne. Yet, it is beyond dispute that in entrapment cases the prosecution must disprove entrapment by proving, beyond a reasonable doubt, that the defendant was "predisposed" to commit the crime before being approached by law enforcement officials. *Mathews* v. *United States*, 485 U.S. 58, 67 (1988). Certainly, claims of predisposition, involving as they do the defendant's history and mental state, are no less onerous to investigate and prove than a claim that another person coerced the defendant. Given that the underlying nature of the two defenses is the same, there is no justifiable reason to treat the defenses differently for purposes of the burden of persuasion.

## II. THE COMMON LAW SUPPORTS PLACING THE BURDEN OF PERSUASION ON THE PROSECUTION

Respondent's arguments respecting the status of the "common law" of duress and other affirmative defenses are, first and foremost, a semantic slight-of-hand. Respondent repeatedly refers to the early common law (or the law at the time the Constitution was enacted) as the "common law." As

Petitioner acknowledged in her brief, Pet. Br. 17-20, early common law defendants often bore the burden of proof, but the common law took a decidedly different track – with respect to duress and other affirmative defenses – in the wake of the Court's seminal opinion in *Davis* v. *United States*, 160 U.S. 469 (1895), over a century ago. Respondent, however, repeatedly uses the phrase "common law" to denote the "early common law" to argue for example, that "the fact that the common law placed the burden of proving the affirmative defense of duress on the defendant soundly dispels any notion that such practice offends any fundamental principle of justice." Resp. Br. 45. The common law cannot be so limited in its definition[10] and, in any event, that is a poor effort to distract the Court from a century of important common law doctrine that should govern this case.

Petitioner's opening brief cites the innumerable cases in both federal and state courts[11] that have established a strong majority common law rule the requires prosecutors to disprove a properly raised duress defense. Pet. Br. 24-34. Respondent's substantive argument in response attacks the continued validity of *Davis* following the Insanity Defense Reform Act of 1984[12] and asserts that the Court should disregard all of the cases that "merely followed Davis"

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[10] "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933); *see also Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 533 n.28 ("The common law, of course, is an evolving body of law.").

[11] Respondent's reaction to Petitioner's demonstration that the vast majority of states (29 in number) do not shift the burden of duress while only 14 do, amounts to saying little more that "14 out of 50 ain't bad." Resp. Br. 38 n.30. Petitioner likes those numbers too.

[12] Pub. L. No. 98-473, Tit. II, Ch. IV, 98 stat. 2057 ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."), codified at 18 U.S.C. § 17(b).

because they are of "questionable value." Resp. Br. 34. That Congress permitted a shift of the burden of proof in insanity cases, however, only reinforces Petitioner's position. As Respondent points out, Congress legislates against a backdrop of common law. Resp. Br. 29. That Congress took steps with respect to the insanity defense did not in any way effect or abrogate the validity of other case law declaring that a burden-shift in a duress case would be improper. If the Act tells us anything at all, it shows Congress saw no need to act with respect to the common law of affirmative defenses as a whole. In reality, the Insanity Defense Reform Act of 1984 is a red-herring: The common law principle that a prosecutor must prove to a jury that a properly presented duress defense does not raise a reasonable doubt remains wholly intact.

Moreover, Respondent cannot seriously maintain that the core holding in *Davis* has been overruled. *Davis* rejected the early common law practice that allocated burdens of proof in criminal cases in the same fashion as civil ones. "The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence." *Davis*, 160 U.S. at 485. The premise of this core holding was no less a principle than the *evidentiary* power of the presumption of innocence. *Coffin* v. *United States*, 156 U.S. 432, 460 (1895) ("[P]resumption of innocence is evidence in favor of the accused."). This fundamental distinction between civil and criminal matters led to the trend of courts placing the burden of persuasion on the prosecution. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 917-18 (1968). Further, the legislative history of the Insanity Defense Reform Act of 1984 offers no support for an implied claim that Congress rejected this fundamental distinction. Instead, as Respondent concedes, the Act was a direct reaction to the acquittal of John Hinckley for the attempted murder of President Ronald Reagan. See Resp. Br. 27 n.18. Therefore,

Congress' action "cannot bear the weight [Respondent] places upon it."[13]

Relying upon *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922), Respondent also asserts that "where Congress expressly creates an affirmative defense to criminal conduct, it is well-established that the defendant bears the burden of establishing that defense." Resp. Br. 28. Respondent would like for this Court to be left with the impression that *McKelvey* supports its position that defendants bear the burden of persuasion on Congressionally created affirmative defenses. *McKelvey* says no such thing. To begin with, *McKelvey* concerns the legal sufficiency of the indictment, not the burden of proof at trial. 260 U.S. at 356-57. Further, *McKelvey* relies entirely on civil cases and nowhere acknowledges *Davis*. Respondent's claim that *McKelvey* supports its position is therefore misplaced.

Respondent maintains that the reasoning of *Davis* does not aid the Petitioner because, unlike insanity, "duress does not call into question any presumption relied upon by the government." Resp. Br. 30. Respondent is mistaken. Respondent's own source confirms that a background assumption of our criminal justice system is that people act of

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[13] Respondent also makes much of the fact that Congress once considered a bill to codify the duress defense. Resp. Br. 27 n.19. Remarkably, that bill did not place the burden of persuasion on the defendant despite a recommendation to that effect by the National Commission on Reform of Federal Criminal Laws. *Id.* Indeed, the revised version of the bill left it up to the courts to decide the defense "according to the principles of the common law as they may be interpreted in the light of reason and experience." *Id.* (internal quotation omitted). In any event, this Court's previous rulings make clear that little weight should be given to an unenacted bill. *Puerto Rico Dep't. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *see also Brecht* v. *Abrahamson*, 507 U.S. 619, 632 (1993) ("As a general matter, we are reluctant to draw inferences from Congress' failure to act." (internal quotation omitted)).

their own free will.[14] Without this assumption, it would be impossible to hold individuals criminally responsible for their actions. The duress defense directly challenges this presumption.[15] Indeed, "[t]he excusing condition in duress is the impairment of the actor's ability to control his conduct." 2 Paul H. Robinson, *Criminal Law Defenses* 351 (1984).

## III. DUE PROCESS CONCERNS REQUIRE THE BURDEN OF PERSUASION TO BE PLACED ON THE PROSECUTION

Respondent's brief wholly ignores the holdings in the very line of cases that are the source of due process concerns in this case. In *Morissette* v. *United States*,[16] *Liparota* v. *United States*,[17] and *Staples* v. *United States*,[18] the Court held that the *mens rea* component of crime encompasses concepts of "freedom of the will" and "freedom of choice." Because "affirmative defenses" like duress and self-defense contend that the actions of another and the circumstances at hand deprived the defendant of any reasonable choice other than unlawful action, they traverse this element. The Court's decisions holding that no due process violation under *In re Winship*, 397 U.S. 358 (1970) occurs where defendants are required to prove a defense by a preponderance of evidence turn on the proposition that the defenses in those cases did not

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[14] *See* Newman, *Duress, Free Will And the Criminal Law*, 30 S. Cal. L. Rev. 313, 313 (1957) ("Legal responsibility, be it civil or criminal, implies freedom.").

[15] *See* Newman, 30 S. Cal. L. Rev. at 313 ("[T]he law has reasoned that where it can be shown that a man acted under a compulsion which deprived him of his 'free will,' such an individual would not be held responsible for his act. This, in essence, is the thinking that lies behind the formulation of the criminal duress doctrine.").

[16] 342 U.S. 246 (1952).

[17] 471 U.S. 419 (1985).

[18] 511 U.S. 600 (1994).

traverse an element of the crime charged. *Martin* v. *Ohio*, 480 U.S. at 231 (appellant did not dispute the existence of the three elements to aggravated murder); *Patterson* v. *New York*, 432 U.S. at 205-06 (evidence supporting affirmative defense of extreme emotional duress mitigated murder to manslaughter). Thus, to the extent that a duress defense *does* traverse the *mens rea* element of the charged crime in that it challenges the defendant's ability to act of his or her own volition, the decisions in *Martin* and *Patterson* are in irreconcilable tension with *Morissette*, *Staples* and *Liparota*.

Respondent attempts to reconcile this tension in two ways. First, Respondent argues that "freedom of choice . . . is not a component of mens rea" (Resp. Br. 13), an assertion that cannot survive *Morissette* and its progeny.[19] Second, Respondent contends that duress and similar defenses address only a defendant's motive and not his or her intent. Resp. Br. 33-34. To be sure, the oft-repeated claim that a distinction exists between motive and intent such that a defendant's motive may have no bearing on the *mens rea* element of the crime may hold true in some contexts where the compulsion was not at issue. For example, whether a defendant in an aggravated assault case acted out of simple animus or for pecuniary gain does not bear on the question of whether the defendant's actions were voluntary. In either case, they plainly were and it is inconceivable that a defense based upon such motives would be a defense at all. But the fact that this

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[19] Respondent cites *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), for its assertion that "this Court has never articulated a general constitutional doctrine of mens rea." Resp. Br. 42. *Powell* is wholly inapposite as it involved an Eighth Amendment challenge to a public drunkenness charge where the defense was that the defendant's drunkenness was a product of his disease. Whatever a "general constitutional doctrine of 'mens rea'" may mean, certainly the Court's more recent opinions in *Staples and Liparota*, relying on *Morissette*, have held that it includes "the ability and duty of the normal individual to choose between good and evil." *Staples*, 511 U.S. at 605; *Liparota*, 471 at 425-26 (same).

distinction between motive and *mens rea* holds in these extreme examples offers no instruction in this case and has been rejected by this Court previously in other contexts. *Apprendi* v. *New Jersey*, 530 U.S. 466, 493 (2000) (rejecting a claim that the defendant's "purpose" only went to motive and did not identify an element of the aggravated crime). Recent commentators have also observed that purported distinctions between motive and criminal intent serve only as a means to define away criminal defenses.[20]

In reality, the presence or absence of what Respondent refers to as a "motive" often bears directly upon *mens rea* considerations.[21] The absence of a financial interest, for example, is often used to show that an otherwise law abiding defendant had no intent to violate the law.[22] Indeed, evidence

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[20] *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. Rev. 1, 65-66 (2002) ("[M]otive cannot be shown to be irrelevant to criminal liability, except by defining motives as intentions irrelevant to criminal liability."); *see also* Eric J. Grannis, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178, 189-90, January 1993 ("[I]f one evening A breaks into B's house, it is important to know *why* he did so, as it is burglary only if he did so for the purpose of committing a felony. This illustration demonstrates that what is technically a 'motive' in one context...can be a matter of 'intent' in another.") (emphasis in original).

[21] *See also* Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *1A Fed. Jury Prac. & Instr.* § 17.06 (5th ed.) (explaining that motive evidence may aid in ascertaining a defendant's state of mind or intent); Charles Alan Wright and Kenneth W. Graham, Jr., *22 Fed. Prac. & Proc. Evid.* § 5240 (evidence of motive may be offered to prove requisite mental state).

[22] *E.g.*, *United States* v. *Jones*, 587 F.2d 802, 806-07 (5th Cir. 1979) (lack of motive to defraud Medicare defense); *United States* v. *Huckaby*, 698 F.2d 915, 920-21 (8th Cir. 1982) *cert. denied* 460 U.S. 1070 (1983) (affirming admittance of evidence rebutting defendant's claimed lack of monetary benefit); *see also Martin* v. *United States*, 606 A.2d 120, 127-29 (D.C. 1991) ("Evidence of a lack of motive is quintessentially exculpatory."); *United States* v. *Franklin*, 704 F.2d 1183, 1187-88 (10th

of "motive" is adduced by both prosecutors and defendants in criminal cases and is admissible (and not excluded by trial courts as irrelevant) precisely because it bears upon the "state of mind of the defendant accompanying the act" – the very definition of "intent." Black's Law Dictionary, 810 (6th ed. 1990); *United States v. Turner*, 441 F.2d 1161 (4th Cir. 1971) (where defendant was charged with making a false statement in connection with the acquisition of a firearm, the district court properly allowed testimony that the defendant shot someone "to come in only to show that the [defendant] had the requisite criminal intent at the time he made the false statement"). Accordingly, Respondent cannot resolve the due process tensions in this case by defining compulsion as merely a "motive" that is irrelevant to requisite intent necessary to commit the crime.

Given the state of the common law of the duress defense, there can be but little concern that a holding by this Court that due process principles preclude allocating the burden of persuasion to defendants for such defenses will fundamentally alter the landscape of criminal prosecutions. In contrast, a holding that due process permits such burden shifting would only serve to invite the very same "labeling" concerns – that certain defenses are "affirmative" ones or that defense evidence addresses "motive" and not "intent" - that engendered this Court's ruling in *Apprendi*, 530 U.S. at 494. The effect of a duress defense is to traverse the prosecution's claim that the defendant meant to undertake the unlawful act and due process therefore requires that the burden must remain on the prosecution to convince the jury that this defense does not rise to the level of reasonable doubt.

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Cir. 1983) (rejecting argument that defendant's motive was irrelevant given that intent was element of charged hate crime offense).

## CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit's ruling.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## DIXON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05–7053. Argued April 25, 2006—Decided June 22, 2006

Petitioner was charged with receiving a firearm while under indictment in violation of 18 U. S. C. §922(n) and with making false statements in connection with the acquisition of a firearm in violation of §922(a)(6). She admitted at trial that she knew she was under indictment when she purchased the firearms and knew that doing so was a crime, but claimed that she was acting under duress because her boyfriend had threatened to harm her and her daughters if she did not buy the guns for him. Bound by Fifth Circuit precedent, the District Court declined her request for a jury instruction placing upon the Government the burden to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that petitioner had the burden to establish her defense by a preponderance of the evidence. She was convicted, and the Fifth Circuit affirmed.

*Held:*

1. The jury instructions did not run afoul of the Due Process Clause. The crimes of conviction require that petitioner have acted "knowingly," §922(a)(6)—which "merely requires proof of knowledge of the facts that constitute the offense," *Bryan* v. *United States*, 524 U. S. 184, 193—or "willfully," §924(a)(1)(D)—which requires acting "with knowledge that [the] conduct was unlawful," *ibid.* Thus, the Government bore the burden of proving beyond a reasonable doubt that petitioner knew that she was making false statements and knew that she was breaking the law when she acquired a firearm while under indictment. It clearly met its burden when petitioner testified to that effect. Petitioner contends that she cannot have formed the necessary *mens rea* because she did not freely choose to commit the crimes. However, while the duress defense may excuse conduct that would otherwise be punishable, see *United States* v. *Bailey*, 444 U. S.

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394, 409–410, the existence of duress normally does not controvert any of the elements of the offense itself. The fact that petitioner's crimes are statutory offenses with no counterpart in the common law supports this conclusion. The jury instructions were consistent with the requirement that the Government prove the mental states specified in §§922(a)(6) and 924(a)(1)(D) and did not run afoul of due process by placing the burden on petitioner to establish duress by a preponderance of the evidence. Pp. 3–5.

2. Modern common law does not require the Government to bear the burden of disproving petitioner's duress defense beyond a reasonable doubt. The long-established common-law rule, which places the burden of proving that defense on the defendant, was not upset by *Davis* v. *United States*, 160 U. S. 469. There, the Court interpreted a defendant's insanity to controvert the necessary *mens rea* for a murder committed "feloniously, wilfully, and of his malice aforethought," *id.*, at 474, and required the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence tending to prove insanity also tended to disprove an essential element of the offense. The duress evidence that petitioner adduced at trial does not contradict or tend to disprove any element of her statutory offenses. She is also not helped by the resulting "*Davis* rule," which was not constitutionally mandated, and which Congress overruled by statute, requiring a defendant to prove insanity by clear and convincing evidence.

Petitioner's reliance on *Davis* also ignores the fact that federal crimes are "solely creatures of statute," *Liparota* v. *United States*, 471 U. S. 419, 424, and thus the Court must effectuate the duress defense as Congress "may have contemplated" it in the context of these specific offenses, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 490, n. 3. The Court can assume that, when passing the relevant 1968 Act, Congress was familiar with the long-established common-law rule and the rule of *McKelvey* v. *United States*, 260 U. S. 353, 357—that the one relying on an affirmative defense must set it up and establish it—and would have expected federal courts to apply a similar approach to any affirmative defense or excuse for violating the new law. To accept petitioner's contrary hypothesis that *Davis* dramatically upset well-settled law would require an overwhelming consensus among federal courts placing the burden on the Government, but conflict among the Circuits demonstrates that such consensus has never existed. For a similar reason, no weight is due the 1962 Model Penal Code. There is no evidence that Congress endorsed the Code's views or incorporated them into the 1968 Act. In fact, when Congress amended the Act to add a *mens rea* requirement, it punished "willful" violations, a mental state not em-

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braced by the Code. Effectuating the affirmative defense as Congress may have contemplated it, the Court presumes that, in the context of the firearms offenses here and the long-established common-law rule, Congress intended petitioner to bear the burden of proving the duress defense by a preponderance of the evidence. Pp. 5–15.

413 F. 3d 520, affirmed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined. BREYER, J., filed a dissenting opinion, in which SOUTER, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 05–7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 2006]

JUSTICE STEVENS delivered the opinion of the Court.

In January 2003, petitioner Keshia Dixon purchased multiple firearms at two gun shows, during the course of which she provided an incorrect address and falsely stated that she was not under indictment for a felony. As a result of these illegal acts, petitioner was indicted and convicted on one count of receiving a firearm while under indictment in violation of 18 U. S. C. §922(n) and eight counts of making false statements in connection with the acquisition of a firearm in violation of §922(a)(6). At trial, petitioner admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

Petitioner contends that the trial judge's instructions to the jury erroneously required her to prove duress by a preponderance of the evidence instead of requiring the Government to prove beyond a reasonable doubt that she did not act under duress. The Court of Appeals rejected petitioner's contention, 413 F. 3d 520 (CA5 2005); given

contrary treatment of the issue by other federal courts,[1] we granted certiorari, 546 U. S. __ (2006).

I

At trial, in her request for jury instructions on her defense of duress, petitioner contended that she "should have the burden of production, and then that the Government should be required to disprove beyond a reasonable doubt the duress." App. 300. Petitioner admitted that this request was contrary to Fifth Circuit precedent, and the trial court, correctly finding itself bound by Circuit precedent, denied petitioner's request. *Ibid.* Instead, the judge's instructions to the jury defined the elements of the duress defense[2] and stated that petitioner has "the burden of proof to establish the defense of duress by a preponderance of the evidence." *Id.*, at 312.

Petitioner argues here, as she did in the District Court and the Court of Appeals, that federal law requires the Government to bear the burden of disproving her defense beyond a reasonable doubt and that the trial court's erro-

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[1] Cf., *e.g.*, *United States* v. *Talbott*, 78 F. 3d 1183, 1186 (CA7 1996) *(per curiam)*; *United States* v. *Riffe*, 28 F. 3d 565, 568, n. 2 (CA6 1994); *United States* v. *Simpson*, 979 F. 2d 1282, 1287 (CA8 1992).

[2] There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense, see, *e.g.*, *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980), and need not do so today. Instead, we presume the accuracy of the District Court's description of these elements: (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm. See App. 312–313; see generally *United States* v. *Harper*, 802 F. 2d 115, 118 (CA5 1986).

neous instruction on this point entitles her to a new trial. There are two aspects to petitioner's argument in support of her proposed instruction that merit separate discussion. First, petitioner contends that her defense "controverted the *mens rea* required for conviction" and therefore that the Due Process Clause requires the Government to retain the burden of persuasion on that element. Brief for Petitioner 41. Second, petitioner argues that Fifth Circuit's rule is "contrary to modern common law." *Id.*, at 14.

## II

The crimes for which petitioner was convicted require that she have acted "knowingly," §922(a)(6), or "willfully," §924(a)(1)(D).[3] As we have explained, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan* v. *United States*, 524 U. S. 184, 193 (1998) (footnote omitted). And the term "willfully" in §924(a)(1)(D) requires a defendant to have "acted with knowledge that his conduct was unlawful." *Ibid.* In this case, then, the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she was making false statements in connection with the acquisition of firearms and that she knew she was breaking the law when she acquired a firearm while under indictment. See *In re Winship*, 397 U. S. 358, 364 (1970). Although the Government may have proved these elements in other ways, it clearly met its burden when petitioner testified that she knowingly committed certain acts—she put a false address on the forms she completed to purchase the firearms, falsely claimed that she was the actual buyer of the firearms, and falsely stated that she was not under indictment at the time of the purchase—and when she

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[3] Although §922(n) does not contain a *mens rea* requirement, the relevant sentencing provision, §924(a)(1)(D), requires that a violation be committed willfully.

testified that she knew she was breaking the law when, as an individual under indictment at the time, she purchased a firearm. App. 221–222.

Petitioner contends, however, that she cannot have formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question. But even if we assume that petitioner's will was overborne by the threats made against her and her daughters, she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm. The duress defense, like the defense of necessity that we considered in *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980), may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself.[4] As we explained in *Bailey*, "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] and evil-doing hand . . . .'" *Id.*, at 402 (quoting *Morissette* v. *United States*, 342 U. S. 246, 251 (1952)). Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Bailey*, 444 U. S., at 402.[5]

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[4]As the Government recognized at oral argument, there may be crimes where the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable doubt. See Tr. of Oral Arg. 26–27; see also, *e.g.*, 1 W. LaFave, Substantive Criminal Law §5.1, p. 333 (2d ed. 2003) (hereinafter LaFave) (explaining that some common-law crimes require that the crime be done "'maliciously'"); Black's Law Dictionary 968 (7th ed. 1999) (defining malice as "[t]he intent, without justification or excuse, to commit a wrongful act").

[5]Professor LaFave has explained the duress defense as follows:

"The rationale of the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the

The fact that petitioner's crimes are statutory offenses that have no counterpart in the common law also supports our conclusion that her duress defense in no way disproves an element of those crimes. We have observed that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota* v. *United States*, 471 U. S. 419, 424 (1985). Here, consistent with the movement away from the traditional dichotomy of general versus specific intent and toward a more specifically defined hierarchy of culpable mental states, see *Bailey*, 444 U. S., at 403–404, Congress defined the crimes at issue to punish defendants who act "knowingly," §922(a)(6), or "willfully," §924(a)(1)(D). It is these specific mental states, rather than some vague "evil mind," Brief for Petitioner 42, or "'criminal' intent," *Martin* v. *Ohio*, 480 U. S. 228, 235 (1987), that the Government is required to prove beyond a reasonable doubt, see *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977) ("The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged in any given case"). The jury instructions in this case were consistent with this requirement and, as such, did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence.

III

Having found no constitutional basis for placing upon the Government the burden of disproving petitioner's

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literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused . . . ." 2 LaFave §9.7(a), at 72 (footnote omitted).

duress defense beyond a reasonable doubt, we next address petitioner's argument that the modern common law requires the Government to bear that burden. In making this argument, petitioner recognizes that, until the end of the 19th century, common-law courts generally adhered to the rule that "the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule." Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 898 (1967–1968). In petitioner's view, however, two important developments have established a contrary common-law rule that now prevails in federal courts: this Court's decision in *Davis* v. *United States*, 160 U. S. 469 (1895), which placed the burden on the Government to prove a defendant's sanity, and the publication of the Model Penal Code in 1962.

Although undisputed in this case, it bears repeating that, at common law, the burden of proving "affirmative defenses—indeed, 'all circumstances . . . of justification, excuse or alleviation'—rested on the defendant." *Patterson*, 432 U. S., at 202 (quoting 4 W. Blackstone, Commentaries *201); see also *Martin* v. *Ohio*, 480 U. S., at 235; *Mullaney* v. *Wilbur*, 421 U. S. 684, 693 (1975). This common-law rule accords with the general evidentiary rule that "the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party." 2 J. Strong, McCormick on Evidence §337, p. 415 (5th ed. 1999). And, in the context of the defense of duress, it accords with the doctrine that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Id.*, at 413. Although she claims that the common-law rule placing the burden on a defendant to prove the existence of duress "was the product of flawed reasoning," petitioner accepts that this was the general rule, at least until this Court's decision in *Davis*. Brief for

Petitioner 18. According to petitioner, however, *Davis* initiated a revolution that overthrew the old common-law rule and established her proposed rule in its place.

*Davis* itself, however, does not support petitioner's position. In that case, we reviewed a defendant's conviction for having committed murder "feloniously, wilfully, and of his malice aforethought." 160 U. S., at 474. It was undisputed that the prosecution's evidence "if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged"; the defendant, however, adduced evidence at trial tending to show that he did not have the mental capacity to form the requisite intent. *Id.*, at 475. At issue before the Court was the correctness of the trial judge's instruction to the jury that the law "'presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it.'" *Id.*, at 476. Under this instruction, "if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there was an entire absence of proof that he was insane." *Id.*, at 479.

In reversing the defendant's conviction, we found ourselves "unable to assent to the doctrine that *in a prosecution for murder* . . . it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing." *Id.*, at 484 (emphasis added). Instead, we concluded that this defendant was "entitled to an acquittal of *the specific crime charged* if upon all the evidence there is reasonable doubt whether he was capable in law of committing the crime." *Ibid.* (emphasis added). Our opinion focused on the "definition of murder," explaining that "it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion,' and with 'malice aforethought.'" *Ibid.* (citations omitted). Reviewing "the

adjudged cases" and "elementary treatises upon criminal law," we found that "[a]ll admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." *Id.*, at 485. Thus, when we ultimately found that the burden of proving the accused's sanity rested on the Government, our holding rested on the conclusion that:

> "[Davis'] guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" *Id.*, at 488.

Our opinion in *Davis*, then, interpreted a defendant's sanity to controvert the necessary *mens rea* for the crime of murder committed "feloniously, wilfully, and of his malice aforethought," *id.*, at 474, as "[o]ne who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' . . . unless at the

time he had sufficient mind to comprehend the criminality or the right and wrong of such an act," *id.*, at 485. We required the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence that tended to prove insanity also tended to disprove an essential element of the offense charged. See *Davis* v. *United States*, 165 U. S. 373, 378 (1897) ("[T]he fact of sanity, *as any other essential fact in the case*, must be established to the satisfaction of the jury beyond a reasonable doubt" (emphasis added)). Whether or not this reasoning correctly treated insanity as negating the *mens rea* for murder as defined in the statute at issue, cf., n. 4, *supra*, it does not help petitioner: The evidence of duress she adduced at trial does not contradict or tend to disprove any element of the statutory offenses that she committed.

Nor does the proposition for which *Davis* has come to stand help petitioner's cause. Although written more narrowly in the context of a prosecution for the crime of murder, *Davis* was later interpreted to establish a general "rule for federal prosecutions . . . that an accused is 'entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.'" *Leland* v. *Oregon*, 343 U. S. 790, 797 (1952) (quoting *Davis*, 160 U. S., at 484); see also *Lynch* v. *Overholser*, 369 U. S. 705, 713 (1962) (explaining that the *Davis* rule applied in all federal courts). After *Davis*, if a federal defendant introduced sufficient evidence to raise a reasonable doubt as to his sanity, it was sufficient to create a question for the jury on which the Government bore the ultimate burden of persuasion beyond a reasonable doubt. See, *e.g.*, *Hall* v. *United States*, 295 F. 2d 26, 28 (CA4 1961); *Holloway* v. *United States*, 148 F. 2d 665, 666 (CADC 1945); *Post* v. *United States*, 135 F. 1, 10 (CA5 1905).

In apparent recognition of the fact that *Davis* relied on the heightened *mens rea* applicable to the particular stat-

ute at issue, we held in *Leland* that this rule was not constitutionally mandated, 343 U. S., at 797, and Congress overruled it by statute in 1984, requiring a defendant to prove his insanity by clear and convincing evidence, 98 Stat. 2057, codified at 18 U. S. C. §17(b). Moreover, Congress has treated the defense of insanity differently from that of duress not only by codifying it but by requiring defendants who intend to rely on an insanity defense to provide advance notice to the Government. See Fed. Rule Crim. Proc. 12.2(a). Thus, even if the rule arising from *Davis* may have once been relevant to an evaluation of other affirmative defenses, Congress' differential treatment of the insanity defense and its rejection of the *Davis* rule are inconsistent with petitioner's invitation to follow *Davis*' lead in this case.

Indeed, petitioner's reliance on *Davis* ignores the fact that federal crimes "are solely creatures of statute," *Liparota*, 471 U. S., at 424, and therefore that we are required to effectuate the duress defense as Congress "may have contemplated" it in the context of these specific offenses, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 491, n. 3 (2001) (internal quotation marks omitted); see also *id.*, at 499 (STEVENS, J., concurring in judgment) (explaining that Court was addressing whether the statute at issue foreclosed a necessity defense to specific charges brought under the statute); *Bailey*, 444 U. S., at 410 ("We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under [18 U. S. C.] §751(a)"). The offenses at issue in this case were created by statute in 1968, when Congress enacted the Omnibus Crime Control and Safe Streets Act (hereinafter Safe Streets Act or Act). See 82 Stat. 197. There is no evidence in the Act's structure or history that Congress actually considered the question of how the duress defense should work in this context, and there is no suggestion

that the offenses at issue are incompatible with a defense of duress.[6] Cf. *Oakland Cannabis Buyers' Cooperative*, 532 U. S., at 491. Assuming that a defense of duress is available to the statutory crimes at issue,[7] then, we must determine what that defense would look like as Congress "may have contemplated" it.

As discussed above, the common law long required the defendant to bear the burden of proving the existence of duress. Similarly, even where Congress has enacted an affirmative defense in the proviso of a statute, the "settled rule in this jurisdiction [is] that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States*, 260 U. S. 353, 357 (1922); see also *United States* v. *Dickson*, 15 Pet. 141, 165 (1841) (calling this "the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes"). Even though the Safe Streets Act does not mention the defense of duress, we can safely assume that the 1968 Congress was familiar with both the long-established common-law rule[8] and the rule

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[6]While Congress' findings in support of the Safe Streets Act show that Congress was concerned because "the ease with which any person can acquire firearms . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States," §901(a)(2), 82 Stat. 225, it would be unrealistic to read this concern with the proliferation of firearm-based violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense, see, *e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 30 (1769).

[7]We have previously made this assumption when addressing common-law affirmative defenses, see *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 491 (2001); *Bailey*, 444 U. S., at 410, and the parties give us no reason to question it here.

[8]Indeed, when a congressional committee did consider codifying the duress defense, it would have had the courts determine the defense "according to the principles of the common law as they may be interpreted in the light of reason and experience." S. 1437, 95th Cong., 2d

applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law.[9]

This conclusion is surely more reasonable than petitioner's hypothesis that *Davis* dramatically upset a well-settled rule of law. Petitioner cites only one federal case decided before 1968 for the proposition that it has been well established in federal law that the Government bears the burden of disproving duress beyond a reasonable doubt. But that case involved a defendant's claim that he "lacked the specific intent to defraud required by the statute for the reason that he committed the offense under duress and coercion." *Johnson* v. *United States*, 291 F. 2d 150, 152 (CA8 1961). Thus, when the Court of Appeals explained that "there is no burden upon the defendant to prove his defense of coercion," *id.*, at 155, that statement is best understood in context as a corollary to the by-then-unremarkable proposition that "the burden of proof rests upon the Government to prove the defendant's guilt beyond a reasonable doubt," *ibid.* Properly understood, *Johnson* provides petitioner little help in her uphill struggle to prove that a dramatic shift in the federal common-law rule occurred between *Davis* and the enactment of the Safe Streets Act in 1968.

Indeed, for us to be able to accept petitioner's proposition, we would need to find an overwhelming consensus among federal courts that it is the Government's burden to disprove the existence of duress beyond a reasonable doubt. The existence today of disagreement among the

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Sess., §501 (1978).

[9] Duress, like the defense at issue in *McKelvey*, is an excuse that allows an exception from liability. See, *e.g.*, 2 LaFave §9.7, at 72 ("The rationale of the defense of duress is that the defendant ought to be excused when he 'is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist' ").

Federal Courts of Appeals on this issue, however—the very disagreement that caused us to grant certiorari in this case, see n. 1, *supra*—demonstrates that no such consensus has ever existed. See also *post*, at 6–8 (BREYER, J., dissenting) (discussing differences in treatment of the duress defense by the various Courts of Appeals). Also undermining petitioner's argument is the fact that, in 1970, the National Commission on Reform of Federal Criminal Laws proposed that a defendant prove the existence of duress by a preponderance of the evidence. See 1 Working Papers 278. Moreover, while there seem to be few, if any, post-*Davis*, pre-1968 cases placing the burden on a defendant to prove the existence of duress,[10] or even discussing the issue in any way, this lack of evidence does not help petitioner. The long-established common-law rule is that the burden of proving duress rests on the defendant. Petitioner hypothesizes that *Davis* fomented a revolution upsetting this rule. If this were true, one would expect to find cases discussing the matter. But no such cases exist.

It is for a similar reason that we give no weight to the publication of the Model Penal Code in 1962. As petitioner notes, the Code would place the burden on the government to disprove the existence of duress beyond a reasonable doubt. See Model Penal Code §1.12, 10A U. L. A. 88 (2001) (hereinafter Model Penal Code or Code) (stating that each element of an offense must be proved beyond a reasonable doubt); §1.13(9)(c), at 91 (defining as an ele-

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[10] In *D'Aquino* v. *United States*, 192 F. 2d 338, 358, n. 11 (CA9 1951), the trial court instructed the jury that it would be warranted in acquitting the defendant on the basis that she acted under duress "'if you believe from the evidence that the defendant committed these acts that the Government alleges . . . under a well grounded apprehension of immediate death or serious bodily injury . . . .'" This instruction did not require the Government to disprove duress beyond a reasonable doubt, and it seemingly placed the burden on the defendant to prove the existence of duress.

ment anything that negatives an excuse for the conduct at issue); §2.09, at 131–132 (establishing affirmative defense of duress). Petitioner argues that the Code reflects "well established" federal law as it existed at the time. Brief for Petitioner 25. But, as discussed above, no such consensus existed when Congress passed the Safe Streets Act in 1968. And even if we assume Congress' familiarity with the Code and the rule it would establish, there is no evidence that Congress endorsed the Code's views or incorporated them into the Safe Streets Act.

In fact, the Act itself provides evidence to the contrary. Despite the Code's careful delineation of mental states, see Model Penal Code §2.02, 10A U. L. A., at 94–95, the Safe Streets Act attached no explicit *mens rea* requirement to the crime of receiving a firearm while under indictment, §924(a), 82 Stat. 233 ("Whoever violates any provision of this chapter . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both"). And when Congress amended the Act to impose a *mens rea* requirement, it punished people who "willfully" violate the statute, see 100 Stat. 456, a mental state that has not been embraced by the Code, see Model Penal Code §2.02(2), 10A U. L. A., at 94–95 (defining "purposely," "knowingly," "recklessly," and "negligently"); Explanatory Note, p. 97 ("Though the term 'wilfully' is not used in the definitions of crimes contained in the Code, its currency and its existence in offenses outside the criminal code suggest the desirability of clarification"). Had Congress intended to adopt the Code's structure when it enacted or amended the Safe Streets Act, one would expect the Act's form and language to adhere much more closely to that used by the Code. It does not, and, for that reason, we cannot rely on the Model Penal Code to provide evidence as to how Congress would have wanted us to effectuate the duress defense in this context.

IV

Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress' silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress "may have contemplated" it in an offense-specific context. *Oakland Cannabis Buyers' Cooperative*, 532 U. S., at 491, n. 3. In the context of the firearms offenses at issue—as will usually be the case, given the long-established common-law rule—we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence. Accordingly, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 05–7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 2006]

JUSTICE KENNEDY, concurring.

No one disputes that, subject to constitutional constraints, Congress has the authority to determine the content of a duress defense with respect to federal crimes and to direct whether the burden of proof rests with the defense or the prosecution. The question here is how to proceed when Congress has enacted a criminal statute, the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 *et seq.* (hereinafter Safe Streets Act), without explicit instructions regarding the duress defense or its burden of proof. See *ante,* at 10.

When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition. See *United States* v. *Bailey,* 444 U. S. 394, 415, n. 11 (1980). Those decisions, in turn, consult sources such as legal treatises and the American Legal Institute's Model Penal Code. See, *e.g., United States* v. *Jimenez Recio,* 537 U. S. 270, 275–276 (2003); *Salinas* v. *United States,* 522 U. S. 52, 64–65 (1997). All of these sources rely upon the insight gained over time as the legal process continues. Absent some contrary indication in the statute, we can assume that Congress would not want to foreclose the courts from consulting these newer

sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition applicable in the particular case.

While the Court looks to the state of the law at the time the statute was enacted, see *ante,* at 12, the better reading of the Court's opinion is that isolated authorities or writings do not control unless they were indicative of guiding principles upon which Congress likely would have relied. Otherwise, it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof. It seems unlikely, moreover, that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment. Consistent with these propositions, the Court looks not only to our precedents and common-law traditions, but also to the treatment of the insanity defense in a 1984 statute and a proposal of the National Commission on Reform of Federal Criminal Laws, even though they both postdated the passage of the Safe Streets Act. See *ante,* at 10, 13.

As there is no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof, the proper approach is simply to apply these principles to the context of duress. See, *e.g.*, *Schaffer* v. *Weast,* 546 U. S. ___, ___ (2005) (slip op., at 6–7) (where the plain text of the statute is "silent on the allocation of the burden of persuasion," we proceed to consider the "ordinary default rule" and its exceptions). The facts needed to prove or disprove the defense "lie peculiarly in the knowledge of" the defendant. 2 K. Broun, McCormick on Evidence §337, p. 475 (6th ed. 2006); see *ante,* at 6. The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution

may be without any practical means of disproving the defendant's allegations. There is good reason, then, to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue. See 2 Broun, *supra*, §337; *ante*, at 6. The analysis may come to a different result, of course, for other defenses.

With these observations, I join the Court's opinion.

# SUPREME COURT OF THE UNITED STATES

No. 05–7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 2006]

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I join the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another.

Duress was an established defense at common law. See 4 W. Blackstone, Commentaries on the Laws of England 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress. Under these circumstances, I believe that the burdens remain where they were when Congress began enacting federal criminal statutes.

I do not assume that Congress makes a new, implicit judgment about the allocation of these burdens whenever it creates a new federal crime or, for that matter, whenever it substantially revises an existing criminal statute.

It is unrealistic to assume that on every such occasion Congress surveys the allocation of the burdens of proof on duress under the existing federal case law and under the law of the States and tacitly adopts whatever the predominant position happens to be at the time. Such a methodology would create serious problems for the district courts and the courts of appeals when they are required to decide where the burden of persuasion should be allocated for federal crimes enacted on different dates. If the allocation differed for different offenses, there might be federal criminal cases in which the trial judge would be forced to instruct the jury that the defendant bears the burden of persuasion on this defense for some of the offenses charged in the indictment and that the prosecution bears the burden on others.

I would also not assume, as JUSTICE BREYER does, see *post*, at 2–3, that Congress has implicitly delegated to the federal courts the task of deciding in the manner of a common-law court where the burden of persuasion should be allocated. The allocation of this burden is a debatable policy question with an important empirical component. In the absence of specific direction from Congress, cf. Fed. Rule Evid. 501, I would not assume that Congress has conferred this authority on the Judiciary.

# SUPREME COURT OF THE UNITED STATES

No. 05–7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 2006]

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

Courts have long recognized that "duress" constitutes a defense to a criminal charge. Historically, that defense "excuse[d] criminal conduct" if (1) a "threat of imminent death or serious bodily injury" led the defendant to commit the crime, (2) the defendant had no reasonable, legal alternative to breaking the law, and (3) the defendant was not responsible for creating the threat. *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980); see also 2 W. LaFave, Substantive Criminal Law §9.7(b), pp. 74–82 (2003) (hereinafter LaFave); *ante*, at 2, n. 1 (opinion of the Court). The Court decides today in respect to *federal* crimes that the defense must bear the burden of both producing evidence of duress and persuading the jury. I agree with the majority that the burden of production lies on the defendant, that here the burden of persuasion issue is not constitutional, and that Congress may allocate that burden as it sees fit. But I also believe that, in the absence of any indication of a different congressional intent, the burden of persuading the jury beyond a reasonable doubt should lie where such burdens normally lie in criminal cases, upon the prosecution.

I

My disagreement with the majority in part reflects my

different view about how we should determine the relevant congressional intent. Where Congress speaks about burdens of proof, we must, of course, follow what it says. But suppose, as is normally the case, that the relevant federal statute is silent? The majority proceeds on the assumption that Congress wished courts to fill the gap by examining judicial practice *at the time that Congress enacted the particular criminal statute in question*. *Ante*, at 10–14 (opinion of the Court). I would not follow that approach.

To believe Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness. It is unrealistic because the silence could well mean only that Congress did not specifically consider the "burden of persuasion" in respect to a duress defense. It simply did not think about that secondary matter. Had it done so, would Congress have wanted courts to freeze current practice statute-by-statute? Would it have wanted to impose different burden-of-proof requirements where claims of duress are identical, where statutes are similar, where the *only* relevant difference is the time of enactment? Why? Indeed, individual instances of criminal conduct often violate several statutes. In a trial for those violations, is the judge to instruct the jury to apply different standards of proof to a duress defense depending upon when Congress enacted the particular statute in question? What if in this very case the defendant's boyfriend had given her drug money and insisted (under threat of death) not only that she use some of the money to buy him a gun, but that she launder the rest? See 18 U. S. C. §1956 (2000 ed. and Supp. II); see *infra*, at 6–7.

I would assume instead that Congress' silence typically means that Congress expected the courts to develop burden rules governing affirmative defenses as they have

done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience. See *Davis* v. *United States*, 160 U. S. 469 (1895); *McNabb* v. *United States*, 318 U. S. 332, 341 (1943); *ante*, at 11, n. 8 (opinion of the Court) (proposed general revision of the federal criminal code would have instructed courts to determine the contours of affirmative defenses "'according to the principles of the common law as they may be interpreted in the light of reason and experience'"); 9 J. Wigmore, Evidence §2486, p. 291 (J. Chadbourn rev. ed. 1981) (allocation of the burdens of proof present courts with questions "of policy and fairness based on experience in the different situations"). That approach would produce uniform federal practice across different affirmative defenses, as well as across statutes passed at different points in time.

II

My approach leads me to conclude that in federal criminal cases, the prosecution should bear the duress defense burden of persuasion. The issue is a close one. In Blackstone's time the accused bore the burden of proof for all affirmative defenses. See 4 W. Blackstone, Commentaries *201; *Patterson* v. *New York*, 432 U. S. 197, 201–202 (1977). And 20th-century experts have taken different positions on the matter. The Model Penal Code, for example, recommends placing the burden of persuasion on the prosecution. ALI, Model Penal Code §1.12, p. 16, §1.13(9)(c), p. 18, §2.09, pp. 37–38 (1985). The Brown Commission recommends placing it upon the defendant. National Commission on Reform of Federal Criminal Laws, 1 Working Papers 278 (1970). And the proposed revision of the federal criminal code, agnostically, would have turned the matter over to the courts for decision. S. 1722, 96th Cong., 1st Sess., §501 (1979). Moreover,

there is a practical argument that favors the Government's position here, namely that defendants should bear the burden of persuasion because defendants often have superior access to the relevant proof.

Nonetheless, several factors favor placing the burden on the prosecution. For one thing, in certain respects the question of duress resembles that of *mens rea*, an issue that is always for the prosecution to prove beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 364 (1970); *Martin* v. *Ohio*, 480 U. S. 228, 234 (1987). The questions are not the same. The defendant's criminal activity here was voluntary; no external principle, such as the wind, propelled her when she acted. The Nicomachean Ethics of Aristotle, p. 54 (R. W. Browne transl. 1865). Moreover, her actions were intentional. Whether she wanted to buy the guns or not, and whether she wanted to lie while doing so or not, she decided to do these things and knew that she was doing them. Indeed, her action was willful in the sense that she knew that to do them was to break the law. *Ante*, at 3–4 (opinion of the Court); see also *Ratzlaf* v. *United States*, 510 U. S. 135, 136–137 (1994).

Nonetheless, where a defendant acts under duress, she lacks any semblance of a meaningful choice. In that sense her choice is not free. As Blackstone wrote, the criminal law punishes "abuse[s] of th[e] free will"; hence "it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion." 4 Commentaries *27. And it is in this "force and compulsion," acting upon the will, that the resemblance to lack of *mens rea* lies. Cf. Austin, Ifs and Cans, in Proceedings of the British Academy 123–124 (1956) (noting difference between choosing to do something where one has the opportunity and ability to do otherwise and choosing to do something where one lacks any such opportunity or ability). *Davis* v. *United States*, *supra*, allocated the

federal insanity defense burden to the Government partly for these reasons. That case, read in light of *Leland* v. *Oregon*, 343 U. S. 790, 797 (1952), suggests that, even if insanity does not always show the absence of *mens rea*, it does show the absence of a "'*vicious* will.'" *Davis*, *supra*, at 484 (citing Blackstone; emphasis added).

For another thing, federal courts (as a matter of statutory construction or supervisory power) have imposed the federal-crime burden of persuasion upon the prosecution in respect to self-defense, insanity, and entrapment, which resemble the duress defense in certain relevant ways. In respect to both duress and self-defense, for example, the defendant's illegal act is voluntary, indeed, intentional; but the circumstances deprive the defendant of any meaningful ability or opportunity to act otherwise, depriving the defendant of a choice that is free. Insanity, as I said, may involve circumstances that resemble, but are not identical to, a lack of *mens rea*. And entrapment requires the prosecution to prove that the defendant was "predisposed" to commit the crime—a matter sometimes best known to the defendant.

As to self-defense, see First Circuit Pattern Criminal Jury Instructions §5.04 (1998); *United States* v. *Thomas*, 34 F. 3d 44, 47 (CA2 1994); *Government of Virgin Islands* v. *Smith*, 949 F. 2d 677, 680 (CA3 1991); *United States* v. *Harris*, Nos. 95–5637, 95–5638, 1996 U. S. App. LEXIS 22040, *4–*5 (CA4, Aug. 27, 1996); *United States* v. *Branch*, 91 F. 3d 699, 714, n. 1 (CA5 1996); Sixth Circuit Pattern Criminal Jury Instructions §6.06 (2005); *United States* v. *Jackson*, 569 F. 2d 1003, 1008, n. 12 (CA7 1978); *United States* v. *Pierre*, 254 F. 3d 872, 876 (CA9 2001); *United States* v. *Corrigan*, 548 F. 2d 879, 883 (CA10 1977); *United States* v. *Alvarez*, 755 F. 2d 830, 842 (CA11 1985); *Bynum* v. *United States*, 408 F. 2d 1207 (CADC 1968); see also *Mullaney* v. *Wilbur*, 421 U. S. 684, 702, n. 30 (1975) (noting this as the "'majority rule'").

As to insanity, see *Davis*, 160 U. S., at 486; *Leland*, *supra*, at 797 (making clear that *Davis* determined burden allocations as a matter of federal, but not constitutional, law); but see 18 U. S. C. §17(b) (overruling this default rule to place the burden on the defendant by clear and convincing evidence). As to entrapment, see *Jacobson* v. *United States*, 503 U. S. 540, 554 (1992) (reversing the judgment affirming the conviction because "the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt" to commit the crime). See also *Patterson*, 432 U. S., at 202 (noting that *Davis* "had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses"); *Patterson*, *supra*, at 231 (Powell, J., dissenting) ("[S]ince this Court's decision in *Davis* . . . federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried this burden of production").

Further, most federal courts, in respect to most federal crimes, have imposed the burden of persuasion in respect to the duress defense upon the Government, following *Johnson* v. *United States*, 291 F. 2d 150, 155 (CA8 1961), and authorities such as E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §13.14, p. 293 (2d ed. 1970), and the Federal Judicial Center Pattern Criminal Jury Instructions §56 (1988). By the mid-1990's, seven circuits had squarely placed the burden of persuasion upon the prosecution; one Circuit (the Fifth) placed the burden on the defendant; and four (the Third, Fourth, Eleventh, and District of Columbia) did not, as far as I can tell, have a definitive practice. Compare *United States* v. *Arthurs*, 73 F. 3d 444, 448 (CA1 1996); *United States* v. *Mitchell*, 725 F. 2d 832, 836 (CA2 1983); *United States* v. *Campbell*, 675 F. 2d 815, 821 (CA6 1982); *United States* v.

*Talbott*, 78 F. 3d 1183, 1186 (CA7 1996) *(per curiam)*; *United States* v. *Campbell*, 609 F. 2d 922, 925 (CA8 1979); *United States* v. *Hearst*, 563 F. 2d 1331, 1336, and n. 2 (CA9 1977); *United States* v. *Falcon*, 766 F. 2d 1469, 1477 (CA10 1985), with *United States* v. *Willis*, 38 F. 3d 170, 179 (CA5 1994) (putting the burden on the defendant by a preponderance). Compare also First Circuit Pattern Criminal Jury Instructions §5.05 (1998); Sixth Circuit Pattern Criminal Jury Instructions §6.05 (1991); Seventh Circuit Pattern Criminal Jury Instructions §6.08 (1998); and Eighth Circuit Pattern Criminal Jury Instructions §§3.09, 9.02 (2000), with Fifth Circuit Pattern Criminal Jury Instructions §1.36 (2001). Petitioner adds, without contradiction, that the States allocate the burden similarly by a ratio of 2 to 1. Brief for Petitioner 32–34; Brief for United States 38, n. 30.

Beginning in 1991, the matter became more complicated because the Ninth Circuit began to require the defendant to bear the burden of proving duress in certain circumstances. *United States* v. *Dominguez-Mestas*, 929 F. 2d 1379, 1382, 1384 (1991) *(per curiam)*. And a few years later the Third, Sixth, and Eleventh Circuits followed suit in cases concerning a closely related justification defense. See *United States* v. *Dodd*, 225 F. 3d 340, 347–350 (CA3 2000); *United States* v. *Brown*, 367 F. 3d 549, 555–556 (CA6 2004); *United States* v. *Deleveaux*, 205 F. 3d 1292, 1298-1300 (CA11 2000); Eleventh Circuit Pattern Criminal Jury Instructions §16 (2003). But see Sixth Circuit Pattern Criminal Jury Instructions §6.05 (2005) (stating that the burden of proof issue for duress is undecided in that Circuit).

These latter cases, however, put the burden on the defendant only where the criminal statute narrows its *mens rea* requirement, *i.e.*, the burden is the defendant's where the statute requires that the defendant act with "knowledge" but not, suggest these courts, where the

statute requires that the defendant act "willfully," "intentionally," or "voluntarily." See, *e.g.*, *Dominguez-Mestas, supra*, at 1382, 1384; *United States* v. *Meraz-Solomon*, 3 F. 3d 298, 300 (CA9 1993); Ninth Circuit Pattern Criminal Jury Instructions §§6.5, 6.6 (2003); but see *United States* v. *Fei Lin*, 139 F. 3d 1303, 1307–1308 (CA9 1998). See also Eleventh Circuit Pattern Criminal Jury Instructions §16 (2003); *United States* v. *Diaz*, 285 F. 3d 92, 97 (CA1 2002) (indicating that this bifurcated rule might be appropriate, but noting Circuit precedent to the contrary). Similarly, the Tenth Circuit placed the burden of proving duress upon the defendant in "strict liability" cases where *mens rea* is not an element of the crime at all. *United States* v. *Unser*, 165 F. 3d 755, 763–765 (CA10 1999).

The apparent upshot is that four Circuits now place the burden of persuasion on the prosecution across the board; one places the burden on the prosecution if the statute requires *mens rea* but not otherwise; and four have held or suggested that the burden should be on the prosecution if the statute requires an intentional or willful state of mind, but not if the statute requires only knowledge. While the Circuits are divided, apparently only one (the Fifth) agrees with the position taken by the Court today.

Further, while I concede the logic of the Government's practical argument—that defendants have superior access to the evidence—I remain uncertain of the argument's strength. After all, "[i]n every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution." *Tot* v. *United States*, 319 U. S. 463, 469 (1943). And the strict contours of the duress defense, as well as the defendant's burden of production, already substantially narrow the circumstances under which the defense may be used. A defendant may find it difficult, for example, to show duress where the relevant conduct took place too long before the criminal act. Cf. *ante*, at 2 (opinion of KENNEDY, J.). That is

because the defendant must show that he had no alternative to breaking the law. *Supra*, at 1. And that will be the more difficult to show the more remote the threat. See also LaFave, § 9.7, p. 77-79 (duress generally requires an "immediate" or "imminent" threat, that the defendant "take advantage of a reasonable opportunity to escape," and that the defendant "terminate his conduct 'as soon as the claimed duress . . . had lost its coercive force'"). More important, the need to prove *mens rea* can easily present precisely the same practical difficulties of proof for the prosecutor. Suppose for example the defendant claims that an old lady told him that the white powder he transported across the border was medicine for her dying son. Cf. *United States* v. *Mares*, 441 F. 3d 1152 (CA10 2006). See also *Mullaney* v. *Wilbur*, 421 U. S., at 702 (requiring the government to prove an absence of passion in a murder conviction imposes "no unique hardship on the prosecution").

It is particularly difficult to see a practical distinction between this affirmative defense and, say, self-defense. The Government says that the prosecution may "be unable to call the witness most likely to have information bearing on the point," namely, the defendant. Brief for United States 21. But what is the difference in this respect between the defendant here, who says her boyfriend threatened to kill her, and a battered woman who says that she killed her husband in self-defense, where the husband's evidence is certainly unavailable? See also *Jacobson*, 503 U. S. 540 (entrapment; need to prove "propensity"). Regardless, unless the defendant testifies, it could prove difficult to satisfy the defendant's burden of *production;* and, of course, once the defendant testifies, cross-examination is possible.

In a word, I cannot evaluate the claim of practicality without somewhat more systematic evidence of the existence of a problem, say, in those Circuits that for many years have imposed the burden on the prosecutor. And, of

course, if I am wrong about the Government's practical need (and were my views to prevail), the Government would remain free to ask Congress to reallocate the burden.

Finally, there is a virtue in uniformity, in treating the federal statutory burden of persuasion similarly in respect to *actus reus*, *mens rea*, mistake, self-defense, entrapment, and duress. The Second Circuit, when imposing the burden of persuasion for duress on the prosecution, wrote that differences in this respect create "a grave possibility of juror confusion." *United States* v. *Mitchell*, 725 F. 2d 832, 836 (1983) (Newman, J., joined by Feinberg, C. J., and Friendly, J.). They risk unfairness as well.

For these reasons I believe that, in the absence of an indication of congressional intent to the contrary, federal criminal law should place the burden of persuasion in respect to the duress defense upon the prosecution, which, as is now common in respect to many affirmative defenses, it must prove beyond a reasonable doubt. With respect, I dissent.